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**Justice and a Lack Thereof:  
Comparative Perspectives on Accountability in the Southern Cone**

A thesis submitted in partial fulfillment of the requirement  
for the degree of Bachelors of Arts in International Relations from  
the College of William and Mary

by

Elsa Marya Voytas

Accepted for \_\_\_\_\_  
(Honors)

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undergraduate, and to my brothers, Luke, Evan, and Gabe who are the best friends anyone could ask for.

## ABSTRACT

Brazil and Argentina, despite geographic proximity and similar histories of oppressive military dictatorships, have pursued decidedly different policies toward judicial accountability for crimes committed during the regime period. In Brazil, amnesty persists, while in Argentina, prosecutions started in 2005. These opposing policies beg the question: what factors determine the introduction and persistence of amnesty laws in a post-conflict reconstruction process? This paper uses comparative case studies to investigate the impact of the type of transition a society undergoes, as well as the role of the judiciary, the executive, human rights organizations, external actors, and public opinion in predicting a country's approach to justice for former offenders. The results suggest that the role of the executive and judiciary are of primary importance in abrogating or affirming amnesty, while human rights organizations and external actors can play a substantial role in establishing accountability if they are able to influence decision-making bodies. More fundamentally, the factors explaining why amnesty is introduced and maintained are interconnected, and a combination of forces are necessary to establish individual accountability measures.

## CHAPTER 1: INTRODUCTION

The concept of transitional justice has garnered the attention of scholars, public officials, and citizens in post-conflict societies. The process of transitional justice has increased since the second world war. Now, more countries embark on a process of transitional justice following political transformation, a series of measures that often, though not always, includes trials of former offenders. Historically, neither institutional mechanisms to ensure accountability nor amnesty laws, granting blanket impunity, existed in post-conflict society; war criminals and their human rights violations were unaddressed in new democracies. Today, however, it is both possible and common for a perpetrator of crimes against humanity to be held individually accountable in an international or domestic context. Although international attempts at accountability in

post-conflict scenarios have been attempted since 1815, their efforts toward justice were typically fruitless.<sup>1</sup> But, over time, things changed considerably. In a striking example of individual accountability, on September 5, 2003, Dragan Nikolic pleaded guilty to gruesome human rights violations committed during the 1992-1995 Bosnian War.<sup>2</sup> Nikolic admitted personally taking part in brutalities against prisoners at the Susica detention camp, including committing numerous murders, employing ax handles to beat prisoners, and allowing Serbian soldiers and guards to abuse and rape Muslim women and girls every night.<sup>3</sup> Mr. Nikolic was the 11<sup>th</sup> person to plead guilty at the International Criminal Tribunal for the Former Yugoslavia in the Hague, but his guilty plea stood out. Mr. Nikolic had been the first man indicted by the tribunal in 1994 and was not captured until six years later in 2000 when he went to trial and pleaded not guilty. At his 2003 trial, however, the outcome was quite extraordinary. For nearly 30 minutes, the German judge Wolfgang Schomburg read the full text of Nikolic's indictment, pausing after each paragraph and asking Nikolic to affirm its correctness. Repeatedly, after each gruesome account of crimes against humanity, Nikolic reasserted that he had indeed committed them, responding "Correct" or "Yes, your honor" at Judge Schomburg's pauses.<sup>4</sup>

Trials like Nikolic's have become more routine since the end of the Cold War. Holding perpetrators of human rights abuses individually accountable through trials poses a stark contrast to previous policies of overlooking past war crimes. This "new age of

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<sup>1</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, (Princeton: Princeton University Press, 2000), 5.

<sup>2</sup> Marlise Simons, "Serb at Hague Pleads Guilty to Brutalities," *New York Times*, September 5, 2003, accessed March 31, 2013, <http://www.nytimes.com/2003/09/05/world/serb-at-hague-pleads-guilty-to-brutalities.html>.

<sup>3</sup> Simons, "Serb at Hague."

<sup>4</sup> Simons, "Serb at Hague."

accountability,” as UN Secretary Ban ki-Moon has dubbed it<sup>5</sup>, has reached every region of the world and has become entrenched in international conventions; nonetheless, amnesty laws and the impunity they ensure are also common among post-conflict communities. This thesis will investigate why some countries pursue accountability while others promote amnesty.

In this introduction, I will provide a brief compendium of transitional justice and address trends in legal norms regarding personal accountability. I will address the increased presence of individual accountability for human rights violations and this concept’s presence in international treaties. Further, the many outlets for carrying out accountability measures will be explained. This discussion will form the backdrop of qualitative case studies of Argentina and Brazil, both of which transitioned to democracy in the 1980s. Argentina and Brazil have conflicting policies toward accountability despite sharing a similar history of human rights violations by oppressive military regimes.

## **Transitional Justice**

Transitional justice can be defined as “the process by which societies move either from war to peace or from a repressive/authoritarian regime to democracy while dealing with resulting questions of justice and what to do with social, political, and economic institutions.”<sup>6</sup> Through her empirical research of states in the midst of transitional justice processes, Wendy Lambourne identifies four key forms of justice: truth, socioeconomic,

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<sup>5</sup> Ban Ki-moon, “The Age of Accountability,” *UN Chronicle*, 2010, accessed February 10, 2013, [http://www.un.org/wcm/content/site/chronicle/home/archive/webarticles2010/The\\_Age\\_of\\_Accountability](http://www.un.org/wcm/content/site/chronicle/home/archive/webarticles2010/The_Age_of_Accountability).

<sup>6</sup> Joanna R. Quinn, *Reconciliation(s): Transitional Justice in Postconflict Societies* (Montreal: McGill-Queen’s University Press, 2009), 3.

political, and accountability.<sup>7</sup> Truth refers not only to fact-finding attempts, but also to offenders acknowledging their responsibility in the conflict and how it impacted society in order to best aid the reconciliation process.<sup>8</sup> The process of obtaining the truth is perhaps most commonly carried out by truth commissions. Socioeconomic justice incorporates monetary “compensation, restitution or reparation for past violations or crimes (historical justice) and distributive or socioeconomic justice in the future (prospective justice).”<sup>9</sup> The new government’s capacity to provide basic services without corruption refers to the political justice aspect of transitional justice and can be embodied through actions like institutional reform.<sup>10</sup> Finally, accountability entails legal justice and responsibility for war crimes and can take a variety of forms.<sup>11</sup>

### **International Organizations and Accountability**

The UN similarly understands transitional justice as a multifaceted process. According to the United Nations’ approach to transitional justice, the process consists of both judicial and non-judicial components including “individual prosecutions, reparations, truth-seeking, institutional reform, vetting, and dismissals.”<sup>12</sup> The UN stresses support for the rule of law, defined as:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the

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<sup>7</sup> Wendy Lambourne, “Transitional Justice and Peacebuilding after Mass Violence,” *The International Journal for Transitional Justice* 3 (2009): 37.

<sup>8</sup> *Ibid.*, 39.

<sup>9</sup> *Ibid.*, 41.

<sup>10</sup> *Ibid.*, 44.

<sup>11</sup> *Ibid.*, 37.

<sup>12</sup> “The rule of law and transitional justice in conflict and post-conflict societies,” October 2010, accessed January 22, 2012, [http://www.unrol.org/files/S\\_2011\\_634EN.pdf](http://www.unrol.org/files/S_2011_634EN.pdf).



principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>13</sup>

In order to establish the most appropriate combination of tactics to facilitate the transitional justice process, the UN vows to encourage compliance with international legal standards, account for the state's political realities, address unique contexts, and "ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms."<sup>14</sup>

Although transitional justice is clearly complex, accountability is often a bastion of the transitional justice process and serves as the focus of this thesis. Specifically, I am interested in why states with similar histories differ in their pursuit of individual accountability for crimes against humanity. Accountability refers to the idea that "some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met."<sup>15</sup> Kathryn Sikkink refers to three different models of accountability when it comes to human rights violations: "(1) the immunity or 'impunity' model; (2); the state accountability model; and (3) the individual criminal accountability model."<sup>16</sup> The first model of impunity characterized the approach used prior to World War II, when both states and state officials were granted amnesty explicitly or implicitly after a conflict and were not prosecuted. After the

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<sup>13</sup> "The rule of law and transitional justice in conflict and post-conflict societies," August 2004, accessed January 22, 2012, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

<sup>14</sup> « Guidance Note of the Secretary General, United Nations Approach to Transitional Justice, » March 2010, accessed January 22, 2012, [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf).

<sup>15</sup> Ruth Grant and Robert O. Keohane, "Accountability and Abuses of Power in World Politics," *American Political Science Review* 99, no. 1 (February 2005): 30.

<sup>16</sup> Kathryn Sikkink, "The Age of Accountability," in *Amnesty in the Age of Human Rights Accountability*, ed. Francesca Lessa and Leigh A. Payne (New York: Cambridge University Press, 2012), 23.

Holocaust, however, when demands for justice increased, the second model of state accountability became common, whereby states were asked by the international community, usually because of a state's obligations as part of an international organization, to change their policy.<sup>17</sup> However, the enforcement of state accountability was weak, and human rights violations continued. The individual criminal accountability model was utilized in an attempt to curb their occurrences, although presently, it coexists with the impunity model that is still maintained in some post-conflict societies.

Transitional justice is multifaceted and diverse empirically, and those who committed crimes against humanity can encounter a wide range of outcomes in the new democracy. Since World War II, various human rights treaties established the obligation to ensure an appropriate remedy after human rights violations have occurred. Born out of liberalism, Bass suggests that universalistic legalism took root, and states began prosecutions in accordance with domestic norms. These domestic, individual human rights norms were assumed to apply universally, transcending sovereignty.<sup>18</sup> Originally established in the Universal Declaration of Human Rights in 1948, the concept of state responsibility for human rights abuses was reaffirmed through the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>19</sup> These conventions primarily upheld the state responsibility model of accountability, merely asking states to remedy their human rights situations given their obligations as signatories of human rights treaties.

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<sup>17</sup> Kathryn Sikkink, "From State Responsibility to Individual Criminal Accountability: A New Regulatory Model for Core Human Rights Violations," in *The Politics of Global Regulation*, ed. Walter Mattli and Ngaire Woods (Princeton University Press, 2009), 123.

<sup>18</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 2.

<sup>19</sup> Universal Declaration on Human Rights (adopted December 10, 1948), UN Doc. A/810, art. 8.; International Covenant on Civil and Political Rights (ICCPR), General Assembly Res. 2200 A (XXI), adopted December 1966, UN GAOR, 21<sup>st</sup> sess., Supp. No. 16, UN Doc. A/6316 (1967), 52.

States were not yet obliged to prosecute specific people who had committed human rights violations. This said, the individual accountability model was in fact established through later conventions. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by the UN General Assembly in 1984 and obligates states to include torture as an offense under domestic law, to investigate cases of torture, and to prosecute or execute those who are accused of torture.<sup>20</sup> Furthermore, it establishes the concept of universal jurisdiction in the event that domestic prosecutions are untenable in Article 5, Paragraph 2.<sup>21</sup> Universal jurisdiction refers to a situation wherein a “state, without seeking to protect its security or credit, seeks to punish conduct irrespective of the place where it occurs, the nationality of the perpetrator, and the nationality of the victim.”<sup>22</sup> Universal jurisdiction has been invoked in a range of cases, notably that of Augusto Pinochet.<sup>23</sup>

Regional treaties like the Inter-American Convention to Prevent and Punish Torture and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment further entrenched the status of torture as a domestic crime necessitating domestic prosecutions on the individual level in the late 1980s.<sup>24</sup>

The so-called age of accountability has been affirmed through a variety of justice seeking bodies like the International Criminal Tribunal for the Former Yugoslavia, established in 1993 by the UN Security Council to try individuals accused of human

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<sup>20</sup> Sikkink, “Age of Accountability,” 26-27.

<sup>21</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol. 1465, 10 December 1984, accessed January 23, 201, 85, <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>.

<sup>22</sup> Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives*, (New York: Oxford University Press), 5.

<sup>23</sup> Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press), 11.

<sup>24</sup> Sikkink, “Age of Accountability,” 28.

rights violation in the former Yugoslavia.<sup>25</sup> The International Criminal Court was established by the Rome Statute in 1998, which posited that some grave crimes are pernicious to the international community at large and therefore can be tried through this international court rather than only through a state's domestic judicial system.<sup>26</sup> Other special courts, like the Special Court of Sierra Leone, also illustrate the global presence of the individual accountability model.<sup>27</sup>

### **Non-governmental Organizations and Accountability**

Non-governmental organizations (NGOs) have come to play a more critical role in states' transitional justice processes. The International Center for Transitional Justice (ICTJ), a non-profit that strives to ensure accountability after grave human rights violations, is emblematic of the increased international attention devoted to transitional justice. ICTJ believes the transitional justice process must address the core elements of criminal prosecutions, reparations, institutional reform, and truth commissions.<sup>28</sup> Many have criticized positions taken by ICTJ and other trial advocates for suggesting a "one size fits all" approach to transitional justice. Critics argue that a standardized approach deemphasizes local context and that only after understanding the domestic situation can one "ask what, whether, and when transitional justice interventions should be initiated."<sup>29</sup> Although trials of perpetrators of human rights abuses are often a crucial part of addressing mass atrocities, victims stress that trials alone are not enough, and some

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<sup>25</sup> Ibid., 31.

<sup>26</sup> Ibid., 36.

<sup>27</sup> Sikkink, "Justice Cascade," 3,

<sup>28</sup> « What is Transitional Justice ? » *International Center for Transitional Justice*, accessed January 22, 2012, <http://ictj.org/about/transitional-justice>.

<sup>29</sup> Fletcher, Laurel, Harvey Weinstein, and Jamie Rowen, "Context, Timing and the Dynamic of Transitional Justice: A Historical Perspective", *Human Rights Quarterly* 31 (2009): 170.

countries, such as South Africa, have embraced models of transitional justice that legally exclude a prosecutorial component.<sup>30</sup> Nevertheless, ICTJ's increased attention and role in a society's transitional justice process suggests that international non-governmental organizations have played an larger role in the study and practice of returning to normalcy.

### **Impunity Today**

Few scholars deny the recent spread of accountability practices, but amnesty laws are far from extinct, and many countries maintain policies of impunity. Moreover, amnesty has its share of supporters. Jack Snyder and Leslie Vinjamuri contend that “amnesties or other minimal efforts to address the problem of past abuses have often been the basis for durable peaceful settlements”<sup>31</sup> claiming that advocates of prosecuting perpetrators of human rights violations ignore the political realities in a post-conflict state.<sup>32</sup> Snyder and Vinjamuri are not the only prosecution skeptics; despite evidence of a “justice cascade,” or spreading norm of individual accountability practices, amnesty remains intact in many cases.<sup>33</sup>

### **Achieving Accountability**

Societies can choose to deal with those who committed crimes against humanity with myriad policies. Perpetrators can face implicit or explicit amnesty, trials carried out

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<sup>30</sup> Antje du Bois-Pedain, “Accountability through Conditional Amnesty: The Case of South Africa”, in *Amnesty in the Age of Human Rights Accountability* ed. Francesca Lessa and Leigh A. Payne (New York: Cambridge University Press, 2012), 238.

<sup>31</sup> Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” *International Security* 28 (2003/2004): 43.

<sup>32</sup> Snyder and Vinjamuri, “Trials and Errors,” 5.

<sup>33</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton and Company, Inc.), 11.

by the international community, trials through domestic courts, or prosecution through hybrid tribunals. In Rwanda, trials regarding the 1994 genocide occur through three systems: the International Criminal Tribunal for Rwanda (ICTR) set up by the United Nations, trials at the national level, and local trials in Gacaca courts which were selected by the local population to speed the pace of trying 120,000 suspects.<sup>34</sup> In South Africa, on the other hand, an amnesty policy was established as part of a bargaining process that ended the National Party's rule and brought the African National Congress to power through elections.<sup>35</sup> The Truth and Reconciliation Commission (TRC) was established immediately after the democratic transition as a public medium to address victims' needs as well as the amnesty issue.<sup>36</sup> The TRC was able to grant amnesties, and received 7,000 applications for amnesty, as well as 20,000 victims' statements.<sup>37</sup> Although the TRC's amnesty committee closed in 2001, only five cases have been prosecuted through South African courts.<sup>38</sup> In Paraguay, efforts to establish justice after Alfredo Stroessner's dictatorship were mostly non-judicial, and there was no explicit amnesty law. Instead, transitional justice measures were generally confined to truth-seeking attempts executed by the National Truth Commission.<sup>39</sup> However, since no amnesty law ever existed,

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<sup>34</sup> Shannon E. Powers, "Rwanda's Gacaca Courts: Implications for International Criminal Law and Transitional Justice," *American Society of International Law* 15 (2011), <http://www.asil.org/insights110623.cfm>.

<sup>35</sup> James L. Gibson, "Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa", *American Journal of Political Science* 46 (2002): 541.

<sup>36</sup> Stephanus F. Du Toit, "Tensions between Human Rights and the Politics of Reconciliation: A South African Case Study," in *Reconciliation(s): Transitional Justice in Postconflict Societies*, ed. Joanna Quinn (Montreal: McGill-Queen's University Press, 2009), 232.

<sup>37</sup> Gibson, "Truth, Justice, and Reconciliation", 542.

<sup>38</sup> Hugo van der Merwe, "Prosecutions, Pardons and Amnesty: The Trajectory of Transitional Accountability in South Africa," in *Critical Perspectives in Transitional Justice*, ed. Nicola Palmer, Phil Clark, and Danielle Granville (Cambridge, Intersentia, 2012): 447.

<sup>39</sup> MERCOSUR, "Perspectivas comparadas de los procesos de memoria, verdad y justicia en el Cono Sur," (paper presented at the Programa Memoria en Movimiento: Comunicación y Derechos Humanos, Jornada para corresponsales extranjeros y periodistas, Buenos Aires, Argentina, November 22, 2011).

prosecutions have moved forward recently.<sup>40</sup> Countries such as Sierra Leone, Kosovo, Timor-Leste and Cambodia have established hybrid tribunals to ensure accountability and reconciliation where international and domestic actors work in tandem to uphold national law in accordance with international standards.<sup>41</sup> In Cambodia, the Extraordinary Chambers in the Courts of Cambodia (ECCC) were established to prosecute crimes committed during the Khmer Rouge regime from 1975-1979.<sup>42</sup> Upon the tribunal's inception, doubts arose regarding the capacity of the Cambodian judicial system due to insufficient legal qualifications and corruption.<sup>43</sup> Possible corruption and political interference came to light when the Cambodian government tried to prevent several cases from going to trial in 2011.<sup>44</sup>

It is evident that measures to establish accountability are increasing. Data collected by Kathryn Sikkink provide a snapshot of prosecutions in countries that transitioned between 1980 and 2004. Out of 100 such countries, 48 had carried out at least one human rights prosecution.<sup>45</sup> Sikkink also demonstrates that cumulative prosecution years (measuring the frequency and persistence of prosecutions) have increased throughout her period of study in Africa and Europe, but Latin America undoubtedly leads the trend with just over seven average cumulative prosecution years

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<sup>40</sup> Ibid.

<sup>41</sup> Laura Dickinson, "The Promise of Hybrid Courts," *American Journal of International Law*, 97 (2003): 295.

<sup>42</sup> Peter Manning, "Legitimacy, Power and Memory at the Extraordinary Chambers in the Courts of Cambodia," in *Critical Perspectives in Transitional Justice*, ed. Nicola Palmer, Phil Clark, and Danielle Granville (Cambridge: Intersentia, 2012): 217.

<sup>43</sup> Jorg Menzel, "Justice Delayed or Too Late for Justice? The Khmer Rouge Tribunal and the Cambodian 'Genocide' 1975-79," *Journal of Genocide Research*, 9 (2007): 220.

<sup>44</sup> "Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign," Human Rights Watch, October 3, 2011, accessed February 13, 2013, <http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign>.

<sup>45</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton and Company, Inc.), 178-179.

compared to the global mean of nearly three.<sup>46</sup> The trials in the Southern Cone provide a longer period of study, however, since the original transitions occurred several decades ago.

In the Southern Cone region and in the American hemisphere more generally, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) have taken precedent-setting action to embrace the individual accountability model of human rights and have asserted through various cases, first in 1988 and recently in the Gomes Lund case in Brazil in 2010, that states must prosecute and punish individuals who committed crimes denoted in the Inter-American Convention on Human Rights.<sup>47</sup>

The Southern Cone provides a prime environment to investigate the trend toward individual judicial accountability since all five of the nations transitioned from authoritarian, military dictatorships to democracies in the last 30 years.<sup>48</sup> Even despite the trend toward individual accountability, amnesty still persists in some Southern Cone countries like Brazil, while neighboring states like Argentina have punished over 400 perpetrators of human rights violations through domestic courts. The divergence of accountability practices used to confront violent and similar pasts suggests that other variables played a part in determining whether or not amnesty took hold and persisted when military dictatorships ended. Given the varying approaches to impunity and justice, this thesis will investigate which factors determine the introduction and persistence of amnesty laws, using the Southern Cone experiences to substantiate conclusions,

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<sup>46</sup> Ibid.

<sup>47</sup> Mark Freeman and Max Pensky, "The Amnesty Controversy in International Law," in *Amnesty in the Age of Human Rights Accountability*, ed. Francesca Lessa and Leigh A. Payne (New York: Cambridge University Press, 2012), 58-59.

<sup>48</sup> This includes Argentina, Brazil, Chile, Paraguay, and Uruguay.



especially the transitions of Brazil and Argentina. This study can lend insight to further investigation of transitional justice and what makes amnesty likely to prevail.

Crystallization of such factors that predict judicial accountability are especially significant in today's world, where many countries such as those who were part of the Arab Spring, are embarking on their own processes of transitional justice as they undergo political transformation.

Through an in-depth case study of Argentina and Brazil, I will argue that the most explanatory factor concerning a state's decision to introduce and uphold amnesty is the judiciary, as it has the influence to reinterpret, overturn, or uphold impunity. The executive branch can also greatly impact a state's accountability measures, although in Brazil and Argentina, the president alone cannot determine the legality of amnesty. Human rights organizations (HROs) and external actors yield significant influence when they are able to persuade more powerful actors like the executive and judiciary to establish accountability. Processes of transitional justice are unique, and a specific combination of variables may explain a state's approach to amnesty or accountability.

## CHAPTER 2: LITERATURE REVIEW

What factors determine the introduction and persistence of amnesty laws when a state transitions from conflict or autocracy to democracy? This literature review will introduce variables that may have a role in determining whether amnesty will hold or prosecutions will move forward. I will begin by addressing which factors drive the nature of transition by determining whether the state experiences a ruptured or pacted transition. If the transition is pacted, I will discuss the factors that determine whether amnesty is part of the agreement and factors that help explain whether (or how long) that amnesty will persist. If the state undergoes a ruptured transition, I will also elaborate on the same issue areas to better understand the presence and durability of amnesty. I will scan existing literature and empirical evidence to address the impacts that can be expected by the judiciary, human rights organizations, external actors and public attitudes to play on the presence of amnesty laws. Finally, I will examine how the duration of the oppressive regime prior to transitional justice and the scale of human rights violations that took place under that regime might impact later amnesty.

### **Nature of Transition**

Which factors drive the nature of transition? Transitions can be pacted, where those who held power in the outgoing repressive regime retain that power by establishing favorable policies in the new government. In contrast, a ruptured transition characterizes

one in which the outgoing regime does not negotiate its exit, making trials more likely.<sup>49</sup> Both Argentina and Bolivia underwent ruptured transitions due to tumultuous domestic conditions that allowed for increased calls for accountability. In Bolivia, General García Meza's dictatorship engaged in unprecedented amounts of human rights violations, systematic corruption, and economic mismanagement.<sup>50</sup> As such, mass public mobilization and increasing discontent in the military ranks precipitated a ruptured transition wherein the military could not negotiate its withdrawal from power.<sup>51</sup> The nature of the Bolivian transition permitted García Meza's opponents to indict him. As Bolivian trial scholar Rene Antonio Mayorga argues, "Only with this type of transition, a transition through rupture, or total collapse (as occurred in both Argentina and Bolivia), has it historically been possible to open the space necessary to bring military dictators to justice."<sup>52</sup> With a ruptured transition, the rule of law can be more easily restored, since those corrupting it have left power and are now subject to its contents.

If the transition is pacted, amnesty is negotiated between the outgoing regime and the incoming democracy. The likelihood of trials "develop[s] in different ways in direct correlation with the paths of transition, particularly in connection with the visions and relative power of the different social and institutional factors."<sup>53</sup> When transitions are pacted, the outgoing regime tends to try to preserve their influence and prevent their prosecution by establishing self-amnesty, and trials are less likely.<sup>54</sup> Prior to Chilean

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<sup>49</sup> Sikkink, *The Justice Cascade*, 33.

<sup>50</sup> Rene Antonio Mayorga, "Bolivia's Dictatorship on Trial," in *Transitional Justice and the Rule of Law in New Democracies*, edited by A. James McAdams. (Notre Dame and London: University of Notre Dame Press, 1997), 66.

<sup>51</sup> *Ibid.*, 67.

<sup>52</sup> *Ibid.*

<sup>53</sup> Luis Roninger and Mario Sznajder, *The Legacy of Human-Rights Violations in the Southern Cone* (New York: Oxford University Press, Inc., 1999), 142.

<sup>54</sup> Sikkink, *The Justice Cascade*, 32.

democracy's return in 1990, the military ensured that they would retain influence in the new government.<sup>55</sup> In 1978, a law was passed decreeing amnesty, guaranteeing that "all persons who committed...criminal offenses during the period of the state of siege, between 11 September 1973 and 10 March 1978"<sup>56</sup> would not face prosecution. Moreover, President Pinochet lost a plebiscite for reelection in 1988, but before his successor took office in 1990, the military negotiated an unsupervised budget and the ability to promote officers.<sup>57</sup> These legal measures, enshrined in the pacted transition, increased the durability of amnesty in Chile.

Related to the nature of the transition is the balance of power in the post-conflict society. Andreas O'Shea suggests that "the mechanism or approach that [the new governments] choose will depend not only on perceptions of what is best for the society, but also on the balance of power between the society and its former offenders."<sup>58</sup> Similarly, Roninger and Sznajder contend that the way in which a society with legacies of human rights violations deals with these issues is dependent on the balance of power between integral social and political actors, such as NGOs, the government, and the military.<sup>59</sup> If the balance created by the amnesty law is satisfactory to these actors, amnesty is likely to remain unchallenged. If, however, some of these actors believe the amnesty law creates an inappropriate balance of power, perhaps granting too much influence to the outgoing regime, the amnesty law is likely to be protested, and its

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<sup>55</sup> Anthony W. Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh: The University of Pittsburgh Press, 2005), 169.

<sup>56</sup> Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005), 70.

<sup>57</sup> Pereira, *Political (In)Justice*, 169.

<sup>58</sup> Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (The Hague: Kluwer Law International, 2002), 70.

<sup>59</sup> Luis Roninger and Mario Sznajder, *The Legacy of Human-Rights Violations in the Southern Cone* (New York: Oxford University Press, Inc.), 161.

survival will be endangered. The roles played by these actors will be expanded upon later.

If the transition is ruptured, the outgoing regime might not have the opportunity to ensure its self-amnesty prior to their replacement, or its protection might soon be removed by a new administration. Since the old regime is often discredited by the same rupture that brought about the transition (e.g. an economic downfall or embarrassing military defeat in the cases of Bolivia and Argentina respectively), removing amnesty laws, or excluding them from the transition process, is less controversial. However, Thomas Wright identifies the balance “between justice and prudence” and suggests that if trials are likely to jeopardize a civilian government’s success, they are less likely to transpire.<sup>60</sup> This notion can threaten the persistence of existing amnesty laws, as was the case in Argentina. Although attempts by the military to ensure their impunity were thwarted soon after the new government took power, amnesty was essentially restored due to fear of another military coup and the desire to return to normalcy. President Alfonsín passed the Ley de Punto Final (Full Stop Law) and Ley de Obediencia Debida (Due Obedience Law) which halted most trials, and his successor, Carlos Menem, pardoned those who had been convicted.<sup>61</sup>

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<sup>60</sup> Thomas C. Wright, *State Terrorism in Latin America: Chile, Argentina, and International Human Rights* (Maryland: Rowman and Littlefield Publishers, Inc., 2006), 186.

<sup>61</sup> Pereira, *Political (In)Justice*, 167

## Role of the Judiciary

Features of the judiciary have been used to help explain the presence or absence of amnesty. Judges have the power to affirm, interpret, or annul amnesty.<sup>62</sup> Domestic courts are also often the forums for efforts toward achieving accountability.<sup>63</sup> Additionally, domestic courts are influential when international attempts at accountability are made: domestic courts field extradition requests, and these international attempts may initiate an internal review of amnesty.<sup>64</sup>

The characteristics of the judiciary are often determined by the scope of reform after democratic transition.<sup>65</sup> As Abrao and Torelly note in the case of Brazil, “the absence of a lustration process in the post-dictatorship judicial branch has allowed for the persistence of an elitist and authoritarian mentality.”<sup>66</sup> Additionally, judicial reform might consist of altering its procedures and architecture to make the courts more accountable and independent of the former regime.<sup>67</sup>

In addition, aspects of the court system, such as its reception to outside influence, might play a role in its upholding or abrogating amnesty. Francesca Lessa mentions that the judiciary in Uruguay was resistant to change and acted with caution. Additionally, the judiciary had little training on human rights issues and was initially impervious to

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<sup>62</sup> Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador*, (University Park: The Pennsylvania State University Press, 2010), 57.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Francesca Lessa, “Barriers to Justice: The *Ley de Caducidad* and Impunity in Uruguay,” in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francese Lessa and Leigh A. Payne (New York: Cambridge University Press, 2012), 145.

<sup>66</sup> Paulo Abrão and Marcelo D. Torello, “Resistance to Change: Brazil’s Persistent Amnesty and its Alternatives for Truth and Justice,” in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francese Lessa and Leigh A. Payne (New York: Cambridge University Press, 2012), 173.

<sup>67</sup> Pereira, *Political (In)Justice*, 170-171.

international influences.<sup>68</sup> Reception to international law is particularly important when international bodies have condemned a nation's amnesty laws, since the nation's court must enforce the international decision for it to have any implication on domestic practices.<sup>69</sup>

The role of the judiciary is paramount in many cases because a nation's Supreme Court can declare an amnesty law unconstitutional, as has happened in Argentina, Uruguay, and a host of other nations. In 2009, in a decision that departed from previous Uruguayan Supreme Court positions, the Supreme Court of Justice declared parts of the amnesty law unconstitutional, justifying its decision by citing IACHR and UNHRC reports on Uruguay, IACtHR demands to end impunity, and the Argentine Supreme Court's momentous decision nullifying their amnesty law in 2005.<sup>70</sup>

### **Role of the Executive**

The judiciary plays a crucial role in the nature and persistence of amnesty, but as Cath Collins notes, "judicial branches of government in Latin America have often been characterized as essentially dependent on or subservient to executive interests."<sup>71</sup> Whether this claim is true or not, it is evident that the executive branch can greatly influence the trajectory of amnesty after a country transitions, especially when he advocates for establishing accountability measures.

Consider the role played by President Mujica in Uruguay. When he took office, Mujica signed a decree removing obstacles that prevented trials from occurring. He did

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<sup>68</sup> Lessa, "Barriers to Justice," 139.

<sup>69</sup> Abrao and Torelly, "Resistance to Change," 180.

<sup>70</sup> Lessa, "Barriers to Justice," 139.

<sup>71</sup> Collins, *Post-Transitional Justice*, 158.

this by signing a decree that would open 80 cases closed by previous presidents, and he justified his decision both ethically and as being in compliance with IACtHR's ruling that Uruguay should not allow the amnesty law to thwart efforts toward accountability.<sup>72</sup>

Although Mujica was concerned that a complete annulment of the Amnesty Law would go against the political will (two referenda showed public support of the amnesty law), he himself was a staunch advocate of accountability.<sup>73</sup> However, after the Uruguayan parliament voted to overturn the Amnesty Law, President Mujica's signature was needed for its abrogation, and he promulgated the Parliament's decision on October 28, 2011.<sup>74</sup> Although Mujica felt torn on the issue of amnesty initially, his endorsement ultimately caused its annulment.

### **Role of Human Rights Organizations**

Scholars also acknowledge that action on the part of human rights organization can help explain differing judicial responses to human rights violations.<sup>75</sup> In periods of impunity, human rights organizations might use creative strategies to circumvent amnesty laws, highlight the lack of accountability, pressure those with the power to make changes, and obtain external support to bolster their domestic efforts. Often the actions of human rights organizations, although constrained by domestic realities, can revive justice

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<sup>72</sup> "Uruguay: President Mujica backs military rule inquiries," *BBC*, June 27, 2011, accessed March 27, 2013, <http://www.bbc.co.uk/news/world-latin-america-13937023>.

<sup>73</sup> "Qué baraja," *Montevideo*, May 5, 2011, accessed March 27, 2013, [http://www.montevideo.com.uy/notnoticias\\_137933\\_1.html](http://www.montevideo.com.uy/notnoticias_137933_1.html).

<sup>74</sup> "Derogan en Uruguay la ley de caducidad y ponen fin a la amnistía," *La Nación*, October 27, 2011, accessed March 27, 2013, <http://www.lanacion.com.ar/1418194-uruguay-pone-fin-a-la-ley-de-caducidad>.

<sup>75</sup> Strategies of human rights organizations are highlighted by Wright, Engstrom and Pereira, and Sikkink, among others.



attempts by conjuring memories of the past violence.<sup>76</sup> When human rights organizations have limited space to protest in the new democracy, it becomes more difficult for them to challenge amnesty laws without facing harsh repression. A byproduct of that repression, then, is a more durable amnesty.<sup>77</sup>

In Paraguay, where the political party of the former dictator Alfredo Stroessner remained in power until 2008, human rights organizations were constrained by a lack of opportunity for activism and continued repression.<sup>78</sup> Similarly, although HRO action in Chile was particularly noted for the important work of documenting violence and establishing international connections,<sup>79</sup> after Pinochet lost the plebiscite, “there was...evidence of increasing fragmentation and even contention within the human rights community over accountability-related legal and legislative matters,”<sup>80</sup> thereby weakening HRO attempts to establish accountability. In Uruguay, however, human rights organizations capitalized on eroding impunity by presenting cases not covered in the Ley de Caducidad (Uruguay’s amnesty law), such as in the realms of illegal appropriation of children and crimes with economic implications.<sup>81</sup>

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<sup>76</sup> Elizabeth Jelin and Susana G. Kaufman, “Layers of memories: twenty years after in Argentina,” in *Commemorating War: the Politics of Memory*, ed. Timothy G. Ashplant et al. (New Brunswick: Transaction Publishers, 2009), 98.

<sup>77</sup> Paulo Abrao and Marcelo D. Torelly, “Resistance to Change: Brazil’s Persistent Amnesty and its Alternatives for Truth and Justice,” in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa et al. (New York: Cambridge University Press, 2012), 172.

<sup>78</sup> Peter Lambert and Andrew R. Nickson, “Assessing the Transition,” in *The Transition to Democracy in Paraguay*, ed. Peter Lambert et al. (New York: Macmillan Press, 1997), 201.

<sup>79</sup> Collins, *Post-Transitional Justice*, 66.

<sup>80</sup> *Ibid.*, 102.

<sup>81</sup> Lessa, “Barriers to Justice,” 136.

## Role of Public Attitudes

Some scholars suggest that public opinion can serve as a catalyst to derogating amnesty laws and beginning domestic prosecutions.<sup>82</sup> Ruti Teitel suggests that “civil society plays a large role in keeping this discussion [of transitional justice] alive, in pursuing what is necessary, more than just elections, for a transition to be completed.”<sup>83</sup> Public opinion can manifest itself in a variety of ways. Popular demands for justice can be manifested by mass protests in opposition of impunity. Public attitudes can sometimes overturn amnesty themselves, as was possible in the Uruguayan plebiscites, or they can influence the behavior of politicians or the judiciary who have more influence in upholding or ending amnesty.

In Uruguay, the amnesty law was put to a public referendum twice, in 1989 and again in 2009. Victims’ groups waged a campaign to challenge the amnesty law, but in 1989, 55.95% of voters elected to uphold the Ley de Caducidad.<sup>84</sup> Human rights organizations also challenged the law before the Supreme Court, but it too upheld the law in a 3-2 decision.<sup>85</sup> In 2009, the pro-change alliance tried to build upon a growing accountability trend, demonstrated by public protests, human rights advances in neighboring Argentina, and General Pinochet’s arrest in London.<sup>86</sup> Nevertheless, the 2009 referendum upheld the Ley de Caducidad. Since both votes failed to overturn amnesty, powerful political and judicial actors justified their pro-impunity positions as upholding the will of the citizens.<sup>87</sup>

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<sup>82</sup> Nina Schneider, “Impunity in post-authoritarian Brazil: The Supreme Court’s Recent Verdict on the Amnesty Law,” *European Review of Latin American and Caribbean Studies* 90 (2011): 45.

<sup>83</sup> quoted in Abrao and Torelly, “Resistance to Change,” 175.

<sup>84</sup> Lessa, “Barriers to Justice,” 131.

<sup>85</sup> *Ibid.*, 132.

<sup>86</sup> *Ibid.*, 134.

<sup>87</sup> *Ibid.*, 147.

## Role of External Actors

The international environment and external forces have also been used to explain human rights perpetrators facing trial. The causal chain and individual sources of external pressure vary by situation, but might take the form of foreign court rulings, universal jurisdiction, statements from international organizations (such as the IACHR in Latin America), and policies adopted in neighboring countries.<sup>88</sup> According to Naomi Roht-Arriaza, transnational prosecutions, such as those premised on the universal jurisdiction concept, can impel domestic prosecutions through a phenomenon she calls the “Pinochet Effect.”<sup>89</sup> The Pinochet Effect suggests that prosecutions abroad can catalyze domestic prosecutions by demonstrating expanded judicial possibilities and turning the issue of judicial accountability into one of national pride, where citizens often prefer that perpetrators of human rights abuses be held accountable through their own judicial mechanisms.<sup>90</sup> In addition, it can mobilize civil society, which may coalesce into a strong call for justice.<sup>91</sup>

International non-state actors can also play significant roles in a state’s amnesty status. As Gary Bass argues, international human rights groups “can provide expertise and raise the domestic costs in a liberal country for ignoring foreign atrocities.”<sup>92</sup> Relatedly, “domestic social movements reach out to international allies to gain leverage and to bring pressure to bear on their government from the outside” through a

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<sup>88</sup> Roninger and Sznajder suggest that “the key political and social actors took into account the parallel patterns adopted in the neighboring countries for dealing with the legacy of human-rights violations” on page 167.

<sup>89</sup> Naomi Roht-Arriaza, “The Pinochet Precedent and Universal Jurisdiction,” *The New England Law Review* 35 (2011), 315.

<sup>90</sup> Naomi Roht-Arriaza, “The Pinochet Precedent,” 315.

<sup>91</sup> *Ibid.*, 316.

<sup>92</sup> Bass, *Stay the Hand of Vengeance*, 33.

phenomenon Margaret Keck and Kathryn Sikkink term the “boomerang effect”.<sup>93</sup> In this way, domestic actors can create transnational linkages and allies to help them achieve accountability. Cath Collins, however, cautions that “these analyses risk overestimating the extent to which transnational cases are brought or driven by home-country activists” and that it is necessary to distinguish between transnational cases initiated by domestic actors and those initiated by external actors with different goals.<sup>94</sup>

In Chile’s case, despite a 1978 amnesty law, Spanish judge Baltasar Garzón began investigating the Pinochet regime’s crimes against Spanish citizens in 1996, applying universal jurisdiction. As such, when Pinochet traveled to the UK for medical treatment, Garzón ordered his arrest.<sup>95</sup> Although he was returned to Chile when the UK government deemed him unfit for trial due to health concerns, Naomi Roht-Arriaza contends that, as a result of the “Pinochet Effect,” the “the Spanish prosecution gave the human rights groups a new visibility as well as an infusion of energy.”<sup>96</sup> Pinochet was stripped of his senatorial title and attempted prosecutions occurred in Chile.<sup>97</sup> Collins contends, however, that this was not an example of the “boomerang effect” which would suggest that Chilean human rights activists sought Spanish help to initiate prosecutions that were impossible domestically. Instead, Collins suggests that domestic human rights activists were operating internally at the time due to expanded opportunities nationally.<sup>98</sup>

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<sup>93</sup> Margaret E. Keck and Kathryn Sikkink, *Justice Cascade* (Ithaca: Cornell University Press, 1998), 77.

<sup>94</sup> Collins, *Post-Transnational Justice*, 54

<sup>95</sup> *Ibid.*, 82.

<sup>96</sup> Roht-Arriaza, *Pinochet Effect*, 86

<sup>97</sup> Pereira, *Political (In)Justice*, 171.

<sup>98</sup> Collins, *Post-Transnational Justice*, 108.

## Scale of Human Rights Violations

Existing literature suggests that the scale of human rights violations may play a role in the persistence of amnesty. In this explanation, for trials to occur, repression must be evident on a large scale, but not so intense that possibilities for domestic activism are squandered.<sup>99</sup>

Aspects of authoritarianism in the Southern Cone were common throughout the region. Operating in the Cold War context with the aim of preventing communism's spread, the United States focused attention on thwarting internal subversion in American states.<sup>100</sup> In order to do so, the U.S. provided training adhering to their national security strategy and instructed over 70,000 soldiers from 22 Latin American and Caribbean countries, including 11 dictators.<sup>101</sup> This training took place in the School of the Americas, established in Panama in 1946 and later moved to Georgia. Instruction included political training to uproot Marxist insurrection, as well as economic, to end the poverty that encouraged guerilla movements.<sup>102</sup>

Institutionalized state terror began in this climate and under the auspices of protecting national security. Those considered capable of organizing an insurrection were “disappeared” throughout the Southern Cone. Forced disappearance refers to “the practice of police and military of detaining a person and denying this act when relatives of the detainee and human rights organizations inquire about it. It can be assumed

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<sup>99</sup> Sikkink, *The Justice Cascade*, 81.

<sup>100</sup> Wright, “State Terrorism,” 24.

<sup>101</sup> Ibid. 25., “School of the Americas: US Military Training for Latin American Countries,” Report to the Ranking Minority Member, Committee on National Security, House of Representatives, August 1996, accessed March 31, 2013, <http://www.gao.gov/archive/1996/ns96178.pdf>.

<sup>102</sup> Ibid. 26

without exception that the person concerned was interrogated, tortured, killed and his body destroyed or buried in a place unknown to the family and the public.”<sup>103</sup>

Although many of the rationalizations and types of repression were common throughout the Southern Cone, the scale of human rights violations differed throughout, which some scholars suggests explains variation in the existence of amnesty laws, and comparisons are presented below.<sup>104</sup> As shown, the periods of military regimes overlap, and despite the fact that each country experienced significant repression, the scales varied. Of note, Brazil underwent lower incidences of deaths and disappearances, exiles, and perhaps political prisoners than Argentina. Even so, Brazil had a higher level of repression than several of the other Southern Cone countries, which have all begun at least some prosecutions, suggesting that the scale of human rights violations is likely not a key determinant in explaining a democracy’s approach to accountability.

Category	Uruguay	Paraguay	Brazil	Chile	Argentina
Period	1973-85	1954-89	1964-79	1973-89	1976-83
Deaths and disappearances	26	59 executed, 336 disappeared	300-500	3,000-5,000	8,960-30,000
Political Prisoners	60,000	19,862	10,000-50,000	60,000	30,000
Exiles	250,000-500,000	3,470	10,000	40,000	500,000

Table 1. Military regimes in the Southern Cone.

<sup>103</sup>Wolfgang S. Heinz and Hugo Fruhling, *Determinants of Gross Human Rights Violations by State and State-Sponsored Actors in Brazil, Uruguay, Chile, and Argentina, 1960-1990*, (The Hague: Kluwer Law International, 1999), 80.

<sup>104</sup>“Observatorio Derechos Humanos,” Universidad Diego Portales, accessed November 3, 2012, <http://www.icso.cl/observatorio-derechos-humanos/publicaciones-y-actividades/>, “Derechos humanos en Argentina: Informe 2012,” Centro de Estudios Legales y Sociales, accessed November 3, 2012, <http://www.cels.org.ar/common/documentos/Informe2012.pdf>, Anthony Pereira, *Political (In)justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (University of Pittsburgh Press, 2005), 21.

## Summary

When explaining the introduction of amnesty laws in a post-conflict society, the nature of transition (pacted versus ruptured) has substantial explanatory power for the military's role in the new society. Pacted transitions permit the outgoing authoritarian regime to retain influence in the new democracy and ensure its amnesty, while ruptured transitions make negotiations less credible. However, in Southern Cone countries, the time that has lapsed since the military regimes fell makes the mode of transition less important in explaining the persistence of amnesty laws. Typically, many transitions of power have occurred since democracy was reestablished, so any elements of an initial pact have been eroded. Therefore, the nature of the transition is important at the outset, but becomes less salient as time goes by.

The roles of the judiciary and the executive branches are of paramount importance when determining the persistence of amnesty laws. These bodies have the authority to challenge impunity. In some countries, like Uruguay, executives themselves can uphold or derogate amnesty laws. In other countries, if the executives do not hold that explicit power, they can lobby the Supreme Court and legislature or appoint justices that share their view of accountability. The judiciary is typically able to overturn or maintain amnesty laws and many instances of ending impunity originated from Supreme Court decisions.

Human rights organizations and external actors can also help explain the introduction and persistence of amnesty laws, but only to the extent that they can pressure and influence key domestic actors, such as the executive and judiciary. External actors,

such as the IACtHR, have no power themselves to maintain or abrogate amnesty laws; although they rule on such subjects, their decisions must be implemented by domestic actors, and domestic actors are not bound to do so. Empirically, IACtHR rulings have been adopted domestically, but decisions or actions externally can also easily be ignored.

Similarly, human rights organizations often use innovative and creative strategies in attempts to weaken amnesty laws. This weakening, however, does not necessarily mean amnesty laws will be overturned. Even so, the strength and tactics of human rights organizations can be used to find ways to establish accountability even given domestic amnesty laws or convince powerful actors to overturn impunity.

The role of public attitudes and the scale of human rights violations, although they may play a marginal role, have empirically had no systematic impact on the introduction or persistence of amnesty laws. Countries with high levels of repression, like Guatemala, are now beginning domestic prosecutions, while other countries with high repression, like South Africa, still maintain amnesty. Conversely, countries with low levels of repression have initiated trials, while countries with more intense repression, such as Uruguay, have done the same. Similarly, public attitudes rarely have the ability to impact amnesty laws.

The following case studies of Brazil and Argentina, therefore, will examine the impact specifically of recent Supreme Court cases in each country, since I propose that the judiciary plays the most critical role in determining amnesty's status. In Brazil, the Supreme Court upheld the amnesty law in 2010. In Argentina, amnesty was declared unconstitutional by the Supreme Court in 2005. These decisions have led to the current environment, in which Argentina has prosecuted hundreds who committed crimes during the dictatorship, while those who committed similar crimes in Brazil remain protected.



## Predictions

Given the literature on the factors that help explain the nature and persistence of amnesty, it is possible to make predictions about a state's accountability practices.

Without taking specific circumstances into account, if a state has a pacted transition, it is more likely to introduce and maintain amnesty. If accountability is established, it is likely to take longer to be introduced than in a country that has transitioned through rupture. If the transition is ruptured, amnesty is less likely to be guaranteed in the new democracy, and if it is, that amnesty is seen as illegitimate and therefore more easily overturned.

Suppose a judiciary undergoes institutional reform during the transition and is therefore autonomous from the previous military regime. Those changes will make it more likely that the Supreme Court will overturn an amnesty law if one is introduced. If, however, the judicial system is not reformed after a transition but instead retains many of the same justices and policies of the dictatorship, it is more likely to uphold amnesty and thwart accountability attempts.

If an executive favors abrogating amnesty, it is more likely that accountability will be achieved. This could be either through direct action or by lobbying or altering the structure of the Supreme Court. If an executive supports amnesty, he or she will likely exert less effort in establishing accountability and more in preserving the status quo. However, the Supreme Court and legislature can disregard an executive's preference when determining impunity's persistence.

If activity by human rights organizations is innovative and obtains substantial visibility among the general public and key decision-makers, it is more likely to impel

decision-making bodies, like the Supreme Court or executives who can overturn the amnesty law, to represent their preferences and do so. If, however, human rights organizations are less active or only able to act in a severely restricted space, they are unlikely to have much impact in annulling amnesty.

Public attitudes are likely to play a marginal role in most cases. Nonetheless, if the public supports amnesty, impunity is more easily justified by decision-making actors or by the public themselves through plebiscites. If, however, the public mobilizes against amnesty, the result could be similar to activity on behalf of HROs if they are able to influence influential bodies.

External actors can be largely influential in overturning amnesty if they share resources with domestic actors and/or condemn amnesty. If, however, external actors remain removed from the accountability efforts, their influence is irrelevant.

Finally, the scale of violence may be so extreme that advocating trials is not feasible, or violations may be minor so that victims have trouble obtaining enough support for accountability. Further, large-scale violence makes the logistics of trials more complicated, while a smaller number of trials would be easier to complete.

Taken together, the literature predicts that a pacted transition, lack of judicial lustration, a complacent executive, restricted human rights and external activity, approval by the public, and extremely small or large scale violence make amnesty more persistent. In contrast, a ruptured transition, judicial reform, an activist executive, innovative human rights activity, external intervention, public demand for accountability, and a moderate scale of violence will threaten amnesty and make accountability more likely.

## CHAPTER 3: BRAZIL CASE STUDY

### Introduction

Brazil and Argentina share a lot: the breathtaking Iguazu falls, a 765-mile border, and a history of oppressive dictatorships. In the 1960s, 70s, and 80s, both countries experienced military regimes that committed grave human rights violations like many Southern Cone countries attempting to eradicate communism. The operation transcended borders, sharing resources and information to quell perceived internal subversive threats. This said, today, the situation in Argentina is quite unlike that in Brazil, because in Argentina, those who took part in systematic human rights violations are being held accountable through the domestic judicial system.

This accountability was manifested on July 5, 2012, when cheers erupted outside the courtroom in Retiro, Buenos Aires, Argentina, after a trial begun in February 2011 finally concluded. The former Argentine dictator, Jorge Rafael Videla was sentenced to 50 years in prison for baby theft. In addition, Jorge “The Tiger” Acosta received a 30-year sentence for his role leading the “Escuela de Mecánica de la Armada”, a military school that was transformed into a clandestine torture center during the military dictatorship. And Antonio Vanek, who led the military regime from 1982-1983, was sentenced to 15 years in prison. In total, nine individuals involved in the crimes committed during the military dictatorship were convicted and face prison time.<sup>105</sup> One of the babies stolen from his mother during this period, who has now recovered his

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<sup>105</sup> “El ex dictador Videla, condenado a 50 años de cárcel por el robo de bebés,” *Clarín*, May 7, 2012, [http://www.clarin.com/politica/Expectativa-fallo-plan-sistemico-bebes\\_0\\_731327044.html](http://www.clarin.com/politica/Expectativa-fallo-plan-sistemico-bebes_0_731327044.html), “Argentina’s Videla and Bignone guilty of baby theft,” *BBC*, July 5, 2012, <http://www.bbc.co.uk/news/world-latin-america-18731349>.

identity, said, “This ruling not only repairs the victims, and their families and friends, but also the entire society. The sentences today are a collective triumph achieved through the sustained pursuit of justice on behalf of human rights organizations, victims, relatives, and social and political organizations throughout the whole country.”<sup>106</sup> The leader of the human rights organization Abuelas de Plaza de Mayo (Grandmothers of Plaza de Mayo), who has fought for justice since the military dictatorship, explained, “As a Grandmother of Plaza de Mayo, as an Argentine, as Laura’s mom, I felt very good. Finally, I could say ‘Mission Accomplished.’”<sup>107</sup>

The outcome of this Argentine trial, however, poses a stark contrast to the situation in Brazil. Argentina has been trying, sentencing, and imprisoning those who comprised or assisted the military dictatorship since the Supreme Court ruled the previous amnesty laws unconstitutional in 2005. Meanwhile, few associated with the oppressive military regime in Brazil have faced trial, and domestic judicial impunity persists.

Although notable human rights advances have been forged since the downfall of the military dictatorship that ruled Brazil from 1964-1985, the Amnesty Law remains intact and was reaffirmed by the Supreme Court in 2010. I will argue that the Brazilian Amnesty Law was introduced due to a pacted transition and has persisted because it has been supported by the executive and judicial branches, probably in part because of continued military influence in civil society. In this way, and due to persistent repression, human rights organizations have had difficulty directing actions by the executive and

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<sup>106</sup> “El ex dictador Videla, condenado a 50 años de cárcel por el robo de bebés,” *Clarín*, May 7, 2012, [http://www.clarin.com/politica/Expectativa-fallo-plan-sistematico-bebes\\_0\\_731327044.html](http://www.clarin.com/politica/Expectativa-fallo-plan-sistematico-bebes_0_731327044.html).

<sup>107</sup> Victoria Ginzberg, “Ellos no miran a los ojos,” *Página 12*, July 8, 2012, <http://www.pagina12.com.ar/diario/elpais/1-198205-2012-07-08.html>.

judiciary, who have greater influence in abrogating the amnesty law. Furthermore, external pressure has been largely absent in Brazil until the Inter-American Commission on Human Rights (IACHR)'s condemnation of Brazil's Amnesty Law in 2011. The lack of external pressure has allowed the domestic executive and judiciary to continue their support for impunity without resistance. This said, recent developments, such as the IACtHR's statement and activity on the part of human rights organizations, may threaten the existing amnesty law.

## **Background**

On April 2, 1964 in Brazil, a military junta consisting of General Arthur de Costa e Silva, Vice-Admiral Rademaker, and Brigadier Correia de Mello set forth a new government and established a national security state, ousting leftist President Joao Goulart. On April 15, General Humberto Castello Branco was elected president by the electoral college. Educated in the Escola Superior de Guerra (ESG), these military officials were influenced by American fears in the Cold War environment. Because many of their instructors were American, they were hyper-aware of the possibility of surreptitious takeover by an internal, communist enemy. The military junta abided by the Doctrine of National Security contained in the ESG curriculum. As such, they unrolled political, economic, psychosocial, and military strategies to quell the subversive threat. According to ESG doctrine, the political strategy included "surveillance and control of political parties, the legislature, the judiciary, and the executive."<sup>108</sup> Militarily, hierarchy was emphasized, and controls were enforced to ensure that the views of those in power

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<sup>108</sup> Maria Alves, *State and Opposition in Military Brazil* (Austin: University of Texas Press, 1985), 38.

were predominant.<sup>109</sup> The psychosocial strategy consisted of “Operation Clean-up”, wherein the military conducted search-and-arrests of particular groups deemed suspicious, like students, labor union members, and peasants. These groups were targeted because they were considered most likely to organize opposition.<sup>110</sup> Further, a second group of targets included “concerned institutions which exercised control over the public and could help victims of human rights violations, even to the point of opposing the new regime.”<sup>111</sup> This is why groups such as the Brazilian Bar Association, the Catholic Church, and the Brazilian Press Association often became victims of imprisonment and/or torture.<sup>112</sup>

The powers of the executive were expanded through Institutional Act No. 5 (AI-5) in 1968, which granted the ability to choose Congress, state, and municipal assemblies, allowed the executive to annul mandates issued locally, asserted the right to place citizen’s political rights in abeyance for 10 years, maintained the right to remove employees in federal, state, or local government, suspended habeas corpus, and included various other provisions that were to hold unless the president issued its revocation. By 1972, guerilla activity was greatly reduced in Brazil due to a confluence of factors including torture executed by the state security apparatus. Repression and censorship continued, however, and the government faced opposition only from small groups of courageous activists.<sup>113</sup>

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<sup>109</sup> Ibid., 41.

<sup>110</sup> Ibid., 53.

<sup>111</sup> Wolfgang S. Heinz and Hugo Fruhling, *Determinants of Gross Human Rights Violations by State and State-Sponsored Actors in Brazil, Uruguay, Chile, and Argentina, 1960-1990*, (The Hague: Kluwer Law International, 1999), 85.

<sup>112</sup> Ibid.

<sup>113</sup> Thomas Skidmore, *The Politics of Military Rule in Brazil, 1964-1985* (New York: Oxford University Press, 1988), 141.

After the military had restricted political participation, their repression targeted not only guerilla groups, but also peaceful groups without clear communist connections, such as student associations and labor unions. At the same time, some militant guerilla groups emerged with the goal of dismantling the Brazilian military dictatorship. These groups drew inspiration from the model of the Cuban communist revolution.<sup>114</sup>

Ultimately, however, the more powerful military government, which employed systematic torture and infiltration, defeated the guerilla groups.<sup>115</sup> This said, some guerrilla actors were guilty of violent tactics, such as Carlos Marighella, who suggested that “the urban guerrilla is a person who fights the military dictatorship with weapons, using unconventional methods. A revolutionary and an ardent patriot, he is a fighter for his country's liberation, a friend of the people and of freedom.”<sup>116</sup> Marighella helped orchestrate the kidnapping of the U.S. ambassador to Brazil as well as other kidnappings and robberies before he was killed by the state.<sup>117</sup>

By 1974 many of the state’s “explicit mechanisms of legal coercion” had been mitigated.<sup>118</sup> A policy of decompression was adopted, which maintained the aim of earlier periods to combat communist threats, but decompression simultaneously attempted to restore democracy. AI-5 was eliminated and executive power was restricted. Political opposition to defend human rights and utilize corporate organizations strengthened during this period.<sup>119</sup>

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<sup>114</sup> Heinz and Fruhling, *Determinants*, 41.

<sup>115</sup> Ibid.

<sup>116</sup> Carlos Marighella, “Minimanual of the Urban Guerrilla,” in *Terror and Urban Guerillas; a Study of Tactics and Documents* ed. Jay Mallin (Coral Gables, Florida: University of Miami Press, 1971), 67.

<sup>117</sup> Ibid.

<sup>118</sup> Alves, *State and Opposition*, 141.

<sup>119</sup> Ibid., 172.

The Abertura, or political opening, continued. The elite opposition began challenging the repressive state apparatus and the economic model in place. In response, the government granted more political space but still constrained certain opposition groups, specifically peasants and members of the working-class.<sup>120</sup> The military regime, however, gained a substantial victory through the Amnesty Law of 1979, still in place today, that “eliminated the possibility of criminal indictment of those accused of torture and would inhibit investigation into the activities of the repressive apparatus.”<sup>121</sup> The law was a political trade-off, as the opposition felt they could only create an open regime with military cooperation, and amnesty was a way of appeasing the hard-liners.<sup>122</sup> In addition, the political parties present during the dictatorship were dissolved and the opposition was fragmented through the Party Reform Bill of 1979.

In 1985, the electoral college elected the first civilian president since 1964: Tancredo Neves. Neves supported military impunity. He died before taking office, and his vice president, José Sarney, took his place. Sarney’s administration instituted economic austerity and attempted to restore nascent democratic institutions.<sup>123</sup>

In the New Republic, though amnesty was still guaranteed for the perpetrators of crimes against humanity, some efforts were made toward accountability. In 1985, a covert operation comprised of lawyers, the Archdiocese of Sao Paulo, and two professional journalists published the names of victims and torturers in a report from Military Justice records called *Brasil: Nunca Mais (Brazil: Never Again)*.<sup>124</sup> This report, however, was produced independent of state and foreign assistance during the

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<sup>120</sup> Ibid., 173.

<sup>121</sup> Ibid., 211.

<sup>122</sup> Skidmore, *The Politics of Military*, 219.

<sup>123</sup> Ibid., 255.

<sup>124</sup> Ibid., 268.



dictatorship and so kept secret until the return of democracy. This autonomous production indicates that the state had no part in admitting or acknowledging guilt on its behalf. Instead, the publication was the result of a few courageous activists. *Brasil: Nunca Mais* is a 7,000-page report compiled from secretly photocopied military court records. During the dictatorship, some of these reports of torture were smuggled to international sources and published in American newspapers. In this way, some of the methods of torture were described, such as being hung upside down from a pipe (“parrot’s perch”), being tortured by a magneto machine that sent high-voltage shocks through a victim’s body, and burning by cigarettes (jokingly referred to as “turning the folks into ash trays”).<sup>125</sup> The report *Brasil: Nunca Mais* documented 242 clandestine torture centers, 444 individual torturers, and a total of 6,016 torture allegations between the years of 1964 and 1977.<sup>126</sup> Three hundred and ten methods of torture were identified, the most common being electrical shocks (527 cases), beatings (344 cases), torture threats (208 cases), the parrot’s perch (189 cases), and death threats (127 cases).<sup>127</sup> The government prohibited investigation by international organizations and the publication of torture reports during the military dictatorship, so these groups were unable to investigate and draw attention to the violations taking place.<sup>128</sup> This made the *Brasil: Nunca Mais* report more significant in highlighting the repression.

One hundred thirty-four Brazilians were disappeared, as documented in *Brasil: Nunca Mais*. Most of those disappeared were members of the Brazil Communist Party.<sup>129</sup>

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<sup>125</sup> “Torture and oppression in Brazil: hearing before the Subcommittee on International Organizations and Movements of the Committee on Foreign Affairs,” House of Representatives, Ninety-third Congress, second session, December 11, 1974.

<sup>126</sup> Heinz and Fruhling, *Determinants*, 77.

<sup>127</sup> Ibid., 72.

<sup>128</sup> Ibid., 79.

<sup>129</sup> Ibid., 81.

The estimated number of exiles was 10,000 in 1982, and an estimated 10-50,000 arrests were made after the military coup in 1964 until democracy was reestablished.<sup>130</sup> Unique to the Brazilian case, political prisoners were regularly tried before military courts and some were acquitted. In the first instance, 3,555 people were acquitted, 984 were excluded for a variety of reasons, and 2,828 were convicted.<sup>131</sup> Those convicted typically faced long-term prison sentences, but many were released prior to the fall of the military regime, and all were released by 1985.<sup>132</sup>

In 2007, the Special Commission on Political Deaths and Disappearances convened by the state published a book titled *Right to Memory and Truth*. The book catalogues 475 cases of violence at the hands of the Brazilian military between 1964 and 1985.<sup>133</sup> However, no official death count has yet been established by any state report. For now, Eric Wiebelhaus-Brahm's scholarly estimate of between 300-500 is widely cited as the most accurate number of deaths.<sup>134</sup> These figures, however, are all likely to be updated when the recently installed National Truth Commission publishes their report when their two-year mandate expires in June 2014.

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<sup>130</sup> Ibid., 65.

<sup>131</sup> Ibid., 70.

<sup>132</sup> Pereira, *Political (In)Justice*, 22-23.

<sup>133</sup> Secretaria Especial dos Direitos Humanos da Presidencia da Republica, *Direito a Memoria e a Verdade: Comissao Especial sobre Mortos e Desaparecidos Politicos* (Integrantes da Comissao Especial sobre Mortos e Desaparecidos Politicos (CEMDP), 2007), accessed November 9, 2012, [http://portal.mj.gov.br/sedh/biblioteca/livro\\_direito\\_memoria\\_verdade/livro\\_direito\\_memoria\\_verdade\\_sem\\_a\\_marca.pdf](http://portal.mj.gov.br/sedh/biblioteca/livro_direito_memoria_verdade/livro_direito_memoria_verdade_sem_a_marca.pdf).

<sup>134</sup> Eric Wiebelhaus-Brahm, "What Does Brazil Have to Gain from a Truth Commission after Two Decades of Democracy?" presented at the International Conference on the Right to Truth, Sao Paulo, Brazil, October 19-20, 2009.

## Nature of Transition

Brazil's 1985 pacted transition was greatly influenced by the military. The armed forces oversaw the return to democracy and guided it to ensure their own best outcome. As such "the old regime was able to sustain a bureaucratic process of forgiveness in which the military would forgive opposition members who had fought against it during the dictatorship, trying to turn amnesty into a process of forgetfulness."<sup>135</sup> The 1979 reciprocal Amnesty Law enshrined this process, in which both opposition and military would receive amnesty. This pacted transition was possible because at the time of transition, lethal violence had almost ceased. In addition, the regime's violence was not extraordinary in the Brazilian context, which features high crime rates even during peacetime.<sup>136</sup> Furthermore, unlike neighboring Argentina's faltering economy, the Brazilian economy was relatively healthy, enhancing the military's credibility for providing prosperity.<sup>137</sup> The military also employed fear tactics similar to those used throughout the years of dictatorship, labeling their opposition as subversive or communist in the hopes of discrediting their opponents.<sup>138</sup> Since the amnesty law was passed six years before the civilian government returned, the military was able to control the transition freely.

The new democracy lacked institutional reform due to the military's stronghold. The ICTJ defines institutional reform as "the process of reviewing and restructuring state institutions so that they respect human rights, preserve the rule of law, and are

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<sup>135</sup> Abrao and Torelly, "Resistance to Change," 170.

<sup>136</sup> Pereira, *Political (In)Justice*, 161

<sup>137</sup> Ibid.

<sup>138</sup> Abrao and Torelly, "Resistance to Change," 170

accountable to their constituents.”<sup>139</sup> Institutional reform is necessary to change the structures that allowed abuses and ensure that individual perpetrators no longer hold influential positions in the new societies. The absence of judicial reform allowed Brazilian judges to not only retain lifetime terms, but to prolong the policies of the dictatorship. The last Supreme Court judge appointed during the military regime only left office in 2003.<sup>140</sup> In this sense, restoring the rule of law has proved difficult, due to the “legal continuity between authoritarianism and democracy” resulting from the highly controlled democratic transition.<sup>141</sup> It was not until 1988 that a democratic Constitution was adopted,<sup>142</sup> and the first president (Henrique Cardoso) who opposed the dictatorship was elected in 1995.<sup>143</sup> He called for the creation of a Ministry of Defense to bring about greater civilian control in areas of national defense policy.<sup>144</sup> However, the military retained much influence in society and a great desire to maintain impunity, creating a formidable environment for human rights protestors who demanded accountability for crimes committed during the dictatorship. In 2008, Minister of Justice Tasro Genro argued that the Amnesty Law did not cover the crime of torture, and therefore, prosecutions against the military regime were legal.<sup>145</sup> Active and retired military members protested this statement and threatened to reveal crimes committed by Genro

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<sup>139</sup> “Institutional Reform,” International Center for Transitional Justice, accessed March 31, 2013, <http://ictj.org/our-work/transitional-justice-issues/institutional-reform>.

<sup>140</sup> Abrao and Torelly, “Resistance to Change,” *Ibid.*, 174.

<sup>141</sup> Leonardo Avritzer, *Democracy and the Public Space in Latin America* (Woodrow Wilson Center Press, 2009), 105.

<sup>142</sup> “Brazil Completes New Constitution,” *New York Times*, September 3, 1998, accessed March 31, 2013, <http://www.nytimes.com/1988/09/03/world/brazil-complete-new-constitution.html>.

<sup>143</sup> Periera, *Political In(Justice)*, 163.

<sup>144</sup> Jorge Zaverucha, “The Fragility of the Brazilian Defense Ministry,” *Revista de Sociologia e Politica* 25 (2005), 107.

<sup>145</sup> Sikkink, *Political (In)Justice*, 158.

and the President at the time, Luiz Inacio da Silva.<sup>146</sup> Such a response from the military, as well as Genro's later statement that the armed forces have an "irreproachable reputation,"<sup>147</sup> suggests that the military still maintains significant leverage over civilian power players. Their influence was further evinced in 2009, when Lula attempted to create a Truth Commission. He sidelined the project after receiving resignation threats from the heads of the three armed forces and his defense minister.<sup>148</sup> The military influence, fortified by the Amnesty Law and the pacted transition, often constrains the efforts for accountability on the part of human rights organizations, the executive, and the judiciary, and was initially extremely useful in explaining the introduction and persistence of the Amnesty Law. Today, however, since many transfers of power have taken place since democracy was restored, the initial nature of transition is less important than current actions on the part of the judiciary, human rights organizations, external actors, and the executive, although the negotiated power transfer meant that the transitional justice process faced initial roadblocks.

### **Role of the Judiciary**

The judiciary has upheld the 1979 Amnesty Law, most recently in their 2010 Supreme Court decision. In 2009, the Brazilian Lawyers' Organization appealed the Amnesty Law to the Supreme Court in an effort to make torture punishable.<sup>149</sup> They argued that the dictatorship committed crimes that constituted torture, which, since the amnesty law prohibited punishment only for political crimes, made accountability

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<sup>146</sup> Ibid.

<sup>147</sup> quoted in Ibid.

<sup>148</sup> "Don't Look Back," *The Economist*, January 7, 2010, accessed March 31, 2013, <http://www.economist.com/node/15213769>.

<sup>149</sup> Schneider, "Impunity," 49.

possible.<sup>150</sup> In addition, they argued, the Amnesty Law was anti-democratic and contradicted the Universal Declaration of Human Rights as well as Brazil's 1988 Constitution.<sup>151</sup> Nevertheless, in April 2010, the Supreme Court upheld the law with a 7-2 vote.<sup>152</sup> The judges who voted in favor of upholding the Amnesty Law justified their decision on historical grounds, arguing that the establishment of the law was acceptable to the military and its opposition and that it had helped create Brazilian democracy.<sup>153</sup>

The judges justified their decision by interpreting the Amnesty Law within the context it was introduced: as a "bilateral" agreement.<sup>154</sup> They agreed that amnesty was "broad, general, and unrestricted" and that it benefited anyone who had committed crimes during the military regime, whether the military itself or opposition forces.<sup>155</sup> Although two justices dissented, the rationalization of the remaining seven show the persistence of the original amnesty justification even 30 years after its introduction.

The judicial branch is critical in explaining the persistence of the Amnesty Law, since they have the power to declare this law unconstitutional and were given the opportunity to do so. Their decision to uphold amnesty suggests that the Supreme Court has ignored efforts by external actors and human rights to abrogate amnesty, perhaps due to a lack of lustration and an unrelenting conservative mindset. Because the Supreme Court has the jurisdiction to rule on the constitutionality of the Amnesty Law, the role of the judiciary is most important in explaining its persistence.

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<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Abrao and Torelly, "Resistance to Change," 165.

<sup>153</sup> Schneider, "Impunity," 49.

<sup>154</sup> "Por 7 a 2, STF rejeita revisar Lei da Anistia para punir torturadores", *Folha da S. Paulo*, April 29, 2010, accessed March 31, 2013, <http://www1.folha.uol.com.br/folha/brasil/ult96u728076.shtml>.

<sup>155</sup> "OAB diz que STF 'perdeu o bonde da história,'" *Folha da S. Paulo*, April 29, 2010, accessed March 31, 2013, <http://www1.folha.uol.com.br/folha/brasil/ult96u727968.shtml>.

## Role of the Executive

Brazil's transitional justice process has been largely driven by the executive branch. However, no president has outright favored overturning the 1979 Amnesty Law, even if other transitional justice mechanisms were implemented. Without challenge from the executive branch, the Amnesty Law can more easily be upheld and justified.

Transitional justice measures were stayed until the presidency of Fernando Henrique Cardoso, who took office in 1995. In 1995, President Cardoso, himself exiled by the former military regime, passed Act 9140.<sup>156</sup> This legislation acknowledged the deaths of 136 people disappeared during the dictatorship and permitted their families to seek compensation.<sup>157</sup> It created a commission that established a framework for reparations and acknowledged state roles in the disappearances.<sup>158</sup> In 2001, President Cardoso sent Congress Law No. 10,559 that compensated two groups of people: those who had arbitrarily lost their jobs as a result of the dictatorship or direct victims of personal violations.<sup>159</sup> The reparation commission addressed the economic nature of much of the military's repression, as well as its tendency to utilize legal and institutional mechanisms instead of violence.<sup>160</sup> By mid-2010, reparations had been disbursed in 12,000 such cases.<sup>161</sup>

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<sup>156</sup> Alexandra Barahona de Brito, "Truth, Justice, Memory, and Democratization in The Southern Cone," in *The Politics of Memory and Democratization: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, et al. (New York: Oxford University Press, Inc., 2001), 142.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Governo Federal, Ministério da Justiça, Comissão de Anistia, "Relações Institucionais e Desenvolvimento do Debate Transicional No Brasil," *Revista Anistia Política e Justiça de Transição* 1 (2009): 15, <http://www.portalmemoriasreveladas.arquivonacional.gov.br/media/2009RevistaAnistia01.pdf>.

<sup>160</sup> Abrão and Torelley, "Resistance to Change," 1551.

<sup>161</sup> "Brazil," International Center for Transitional Justice, accessed March 31, 2013. <http://ictj.org/our-work/regions-and-countries/brazil>.

In 2010, when the Supreme Court upheld the 1979 Amnesty Law, Luiz Inacio “Lula” da Silva was president. Lula, as a young man, was employed in a sheet-metal plant and was elected president of the San Bernardo do Campo metalworkers’ union in 1975 during the military dictatorship. His successful organization of strikes catapulted him to national fame, but in 1980, in the midst of organizing a large-scale walkout, he was arrested. After being convicted of violating the National Security Law, his verdict was overturned, and he continued organizing the activities of the Workers Party and ran in every election since 1985 as their presidential candidate.<sup>162</sup> He was finally elected in 2002.<sup>163</sup> His tradition of sticking up for the repressed, as well as his own victimization during the military dictatorship, were a cause for hope from human rights defenders who wanted to see perpetrators of human rights abuses held accountable.

Lula wished to maintain stability and appease the military, as illustrated by his response when documents from the military dictatorship resurfaced. Thought to be destroyed when the country transitioned to democracy, these documents were actually hidden in secret archives outside of the reach of civilians. When discovered, the military issued a public statement defending their actions during the authoritarian regime. Lula did nothing to counter this statement or punish those who issued it, which so incited his minister of defense, José Viegas, that he resigned.<sup>164</sup> As José Miguel Vivanco, executive director of the Americas program at Human Rights Watch suggested, “Everything depends on the political context and political will, and I don’t see the political will in

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<sup>162</sup> Larry Rohter, “Man in the News; Workingman President, Maybe—Luis Inacio Lula da Silva,” *The New York Times*, October 8, 2002, accessed November 3, 2012, <http://www.nytimes.com/2002/10/08/world/man-in-the-news-workingman-president-maybe-luiz-inacio-lula-da-silva.html?ref=luizinacioluladasilva>.

<sup>163</sup> “What Will Lula Do?” *The Economist*, October 28, 2002, accessed November 3, 2012, <http://www.economist.com/node/1414521>.

<sup>164</sup> Larry Rohter, “Crimes of Brazil’s dictatorship resurface,” *The New York Times*, January 31, 2005, accessed November 3, 2012, <http://www.nytimes.com/2005/01/30/world/americas/30iht-brazil.html>.



Lula's administration. Politicians are rational actors. They are willing to challenge the status quo only if they have a constituency or some pressure, and I don't know if that constituency exists in Brazil the way it does in Argentina and Chile."<sup>165</sup>

Although the Amnesty Law persisted during Lula's administration and the military retained substantial influence, Lula's administration began the "Right to Memory and Truth" project with an official account of disappearances and deaths. The project included "Revealed Memories" which made public archives from the military dictatorship and "Amnesty Caravans" with apologies to victims at the locations of prior crimes.<sup>166</sup> Lula also worked toward establishing a truth commission to chronicle the events that took place during the military dictatorship, hoping to bring a sense of justice to the victims' families albeit not institutionalized justice.<sup>167</sup> The military felt threatened by this measure and top military officials considered resignation. Lula dampened the truth commission's mission by reaffirming the Amnesty Law.<sup>168</sup> However, the commission did not get off the ground until his successor took control.

When the Supreme Court upheld the Amnesty Law, Lula backed the decision. Although some in his administration dissented, most agreed that overturning the law would jeopardize the nation's forward progress.<sup>169</sup>

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<sup>165</sup> Larry Rohter, "Groups in Brazil Aim to Call Military Torturers to Account," *The New York Times*, March 16, 2007, accessed November 3, 2012, [http://www.nytimes.com/2007/03/16/world/americas/16brazil.html?\\_r=0](http://www.nytimes.com/2007/03/16/world/americas/16brazil.html?_r=0).

<sup>166</sup> Abrao and Torelly "Resistance to Change," 156.

<sup>167</sup> "Commissao dos Direitos Humanos da Camara defende criacao da Comissao da Verdade," *Folha de S. Paulo*, July 1, 2010, accessed November 3, 2012, <http://www1.folha.uol.com.br/folha/brasil/ult96u676091.shtml>.

<sup>168</sup> "Don't look back," *The Economist*, January 7, 2010, accessed November 2, 2012, [http://www.economist.com/node/15213769?story\\_id=15213769](http://www.economist.com/node/15213769?story_id=15213769).

<sup>169</sup> Lucas Ferraz and Felipe Seligman, "No STF, governo se posiciona contra a punicao de torturadores," *Folha de S. Paulo*, April 28, 2010, accessed November 3, 2012, <http://www1.folha.uol.com.br/folha/brasil/ult96u727258.shtml>.

Since the Supreme Court's decision, President Dilma Rousseff has been elected. She was part of a guerilla group during the dictatorship and was captured and tortured in 1970.<sup>170</sup> However, this period is something she rarely references in public and seems to play a small role in her decisions regarding justice for perpetrators of human rights abuses. Nevertheless, Rousseff has established a 7-member truth commission with a two-year mandate because "Brazil deserves the truth".<sup>171</sup> They will investigate what occurred by interrogating political prisoners and military officials (who are legally obligated to cooperate) and utilizing archives. The Commission's objectives include, "Clarifying the facts, circumstances and perpetrators of serious cases of rape, torture, forced disappearances and concealment of corpses."<sup>172</sup> Their investigation will conclude in June 2014.

However, Rousseff remains in favor of the Amnesty Law and says that she values political agreements that allowed the democratic transition to take place.<sup>173</sup> Her decision may be influenced by powerful actors in society, such as the military. Nevertheless, the presidents of Brazil have not called for the annulment of the Amnesty Law in the way that President Kirchner did in Argentina in 2003. In contrast, their explicit support of impunity have helped it persist.

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<sup>170</sup> Simon Romero, "Leader's Torture in the '70s Stirs Ghosts in Brazil," *The New York Times*, August 4, 2012, accessed December 5, 2012, <http://www.nytimes.com/2012/08/05/world/americas/president-rousseffs-decades-old-torture-detailed.html?pagewanted=all>.

<sup>171</sup> Shasta Darlington, "Brazil to shed light on 'dirty war' abuse, *CNN*, August 3, 2012, accessed on November 3, 2012, <http://www.cnn.com/2012/08/02/world/americas/brazil-truth-commission/index.html>.

<sup>172</sup> "Brazil," International Center for Transitional Justice, accessed November 3, 2012, <http://ictj.org/our-work/regions-and-countries/brazil>.

<sup>173</sup> Thomas Muello, "President Dilma Rousseff says there will be neither revenge nor forgiveness for dictatorship in the Truth Commission," *Folha d. Sao Paulo*, July 17, 2012, accessed November 3, 2012, <http://www1.folha.uol.com.br/internacional/en/national/1091651-president-dilma-rousseff-says-there-will-be-neither-revenge-nor-forgiveness-for-dictatorship-in-the-truth-commission.shtml>.

Because the executive branch in Brazil has never vocally supported accountability measures with legal punishments, presidents have contributed to amnesty's persistence in Brazil. If an executive were to come out against impunity, such as President Kirchner did in Argentina in 2003, that president might pressure the Supreme Court or the legislature to move toward annulling amnesty. Further, he might appoint justices who would decide that amnesty was unconstitutional. As this has not occurred in Brazil, amnesty has gone unchallenged through the outlets available to the executive, suggesting that Brazilian presidents have not represented the demands of external actors and human rights organizations. This said, because the judiciary could establish accountability without the approval of the executive, the president plays a less determinate role in abrogating amnesty than the Supreme Court.

### **Role of Human Rights Organizations**

The current human rights environment also deserves attention as a possible explanation of the Supreme Court's recent decision to uphold amnesty. Human rights organizations' ability to pressure bodies with the power to overturn amnesty has been limited since Brazil's democratic transition. Human rights defenders have much to fear operating in modern-day Brazil. The largely untouched past and controlled transition from military dictatorship to democracy means that much of the corruption and repression that characterized the period of 1965-1984 is still present today.<sup>174</sup> Around 1,000 civilians each year are killed by the Rio de Janeiro police. The police exert total control and are rarely punished for their repressive actions. When Judge Patrícia Acioli

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<sup>174</sup> "It Isn't Even Past," *The Economist*, November, 19, 2011, accessed November 2, 2012, <http://www.economist.com/node/21538786>.

sentenced 60 officers who belonged to militia groups and death squads, she was killed, perhaps by a senior police officer now in custody. Amnesty International's Brazil director, Atila Roque claims "It's not by chance that the police replicate a pattern of human-rights violations like that in a military dictatorship", insinuating that the authoritarian legacy has permitted excessive control by government enforcement that has gone unchallenged.<sup>175</sup> Although the federal government engages in fewer repressive tactics, it is unable to confine repression on a more micro level, and as such, Brazil's human rights scores<sup>176</sup> today are worse than during the military regime.<sup>177</sup>

Because repression continues on a local level, these decentralized actors have a vested interest in maintaining impunity for human rights violations. If accountability were established, those responsible for higher repression levels now than during the military regime might themselves face punishment and greater scrutiny for their actions. As such, the owners of these repressive tactics will likely try to preserve the culture of impunity for their own benefit. This will mean more complacency regarding the lack of accountability. Additionally, accountability practices often can be spearheaded by local authorities who begin a justice trend (particularly local judges, such as in Argentina) and pressure federal actors to reinforce their local decisions. If, however, these local actors benefit from impunity, this effect is less likely.

Prior to the Supreme Court case, activities by human rights organizations took place in a threatening environment, as illustrated by the immense police corruption and activist repression. The tactics Brazilian HROs utilized were dictated and constrained not

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<sup>175</sup> Ibid.

<sup>176</sup> Scores are obtained from the Political Terror Score (PTS) that aggregates information from Amnesty International and State Department annual country reports.

<sup>177</sup> Sikkink, *The Justice Cascade*, 158-169.

only by this repression, but also by the military's persistent influence over state affairs. Victims' relatives groups like Tortura Nunca Mais (Torture Never More) pressured for explanations and accountability, but their actions were restricted by the state.<sup>178</sup> In this environment, HROs assisted the efforts of truth commissions or attempts to achieve compensation. They called for public access to documents from the dictatorship period<sup>179</sup> and asked for state recognition of the terror that took place,<sup>180</sup> but these actions failed to generate the publicity or create the sense of solidarity that could be created through actions like the weekly Madres de la Plaza de Mayo marches in Argentina. As Sikkink explains "Argentine human rights activists were not just passive recipients of this justice cascade but instigators of multiple new human rights tactics and transitional justice mechanisms", a statement which did not characterize human rights activities in Brazil until perhaps more recently.<sup>181</sup>

Around the time and particularly after the Supreme Court decision in 2010, human rights organizations began pursuing more unconventional means and innovative tactics to achieve justice. The group Levante Popular da Juventud and Coordination for National Memory, Truth, and Justice began coordinating *esculachos* (meaning "uncover" in Portuguese), public gatherings that bring attention to crimes committed and unpunished. In April, Levante Popular da Juventud held an *esculacho* outside the Supreme Court and simulated torture scenes evocative of those committed during the dictatorship. The protest was meant to impact the federal court, which may soon decide

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<sup>178</sup> Schneider, "Impunity," 6.

<sup>179</sup> Fernanda da Escossia, "Tortura Nunca Mais pede fim do "sigilo eterno" para documentos," *Folha de S. Paulo*, July 11, 2003, accessed November 3, 2012, <http://www1.folha.uol.com.br/folha/brasil/ult96u55182.shtml>.

<sup>180</sup> Iuri Dantas, "Famílias de desaparecidos durante regime military atacam Lula," *Folha de S. Paulo*, October 14, 2003, accessed November 3, 2012, <http://www1.folha.uol.com.br/folha/brasil/ult96u54409.shtml>.

<sup>181</sup> Sikkink, *Justice Cascade*, 60.

whether the Amnesty Law can be applied to cases of permanent crimes, designated as such because the body of the victim has never been found.<sup>182</sup> In June, human rights organizations along with 1,500 people participated in a different kind of *esculacho*, one similar to the “*escraches*” held by the HIJOS human rights organization in Argentina. The large group marched to the home of Dulene Garcez Aleixo dos Reis, an army captain in 1970 who tortured victims during that period. These human rights organizations have orchestrated similar action for other known torturers, notably the man who tortured President Dilma Rousseff: Lopes Lima. The protests typically include singing outside of the houses of the former military officials, carrying banners, and writing “AQUI MORA UM TORTURADOR” (here lives a torturer).<sup>183</sup> According to an organizer of the movements, “We actually expose these ‘good old people.’”<sup>184</sup>

Other organizations have also begun innovative strategies to achieve legal accountability or impose external pressure for domestic trials. The Center for Justice and International Law (CEJIL), aims to strengthen responses to human rights abuses, specifically through judicial systems, civil society, or other vital players. Together with Tortura Nunca Mais and the Sao Paulo Commission of Family Members of the Persons Killed and Disappeared for Political Reasons, CEJIL called for intervention by the Organization of American States (OAS) in a prime example of Keck and Sikkink’s “Boomerang Effect”. The IACHR found torturers guilty in Brazil and ruled that Brazil

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<sup>182</sup> Marco Antonio Martins, “ONG faz protesto contra suposto torturador na zona sul do Rio,” *Folha de S. Paulo*, June 19, 2012, accessed November 3, 2012, <http://www1.folha.uol.com.br/poder/1106939-ong-faz-protesto-contr-suposto-torturador-na-zona-sul-do-rio.shtml>.

<sup>183</sup> Piero Locatelli, “Suposto torturador de Dilma e alvo de protesto,” *Carta Capital*, May 14, 2012, accessed November 3, 2012, <http://www.cartacapital.com.br/sociedade/suposto-torturador-de-dilma-e-alvo-de-protesto-em-santos/>.

<sup>184</sup> Martins, « ONG faz protesto ».

had to hold torturers accountable through their domestic judicial system.<sup>185</sup> However, the IACHR “has no means of enforcing its rulings and can only recommend that the state investigate and punish human rights violators and compensate the victims.”<sup>186</sup> Further implications of the case will be discussed later.

In recent years, human rights organizations have greatly increased their activism and efforts to end impunity in Brazil. The ICTJ is still active in Brazil, sharing information on truth commissions, and issuing legal advice for establishing judicial accountability.<sup>187</sup> Victims groups like Torture No More and the Sao Paulo Commission of Family Members of the Persons Killed and Disappeared for Political Reasons are still active, as are student groups and labor unions, who recognize the victimization that their groups faced during the dictatorship. These groups favor visible demonstrations against accountability and for re-establishing truth and memory.<sup>188</sup> This said, groups like Levante Popular da Juventud, the Central Única dos Trabalhadores (Sole Center for the Workers), Movimento Nacional Luta Pela Moradia (National Movement of the Struggle for Housing), and the Ordem dos Advogados do Brasil (Order of Attorneys of Brazil), all of whom have recently spoken out or protested the Amnesty Law, tackle a wide variety of issues, so they do not devote all their time and resources to ending impunity, the way HIJOS and Madres de la Plaza de Mayo in Argentina did. As such, their calls for justice, although increasing, may be less salient than those that led to justice in neighboring Argentina.

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<sup>185</sup> “Brazil,” Center for Justice and International Law, accessed November 3, 2012, <http://cejil.org/en/categoria/pais/brazil>.

<sup>186</sup> „Brazil,“ Center for Justice and International Law

<sup>187</sup> “Brazil”

<sup>188</sup> “O golpe militar de 64 atingiu diretamente as organizacoes sindicais,” Central Única Dos Trabalhadores, accessed March 31, 2013, <http://www.cut.org.br/ponto-de-vista/artigos/4819/o-golpe-militar-de-64-atingiu-diretamente-as-organizacoes-sindicais>., “A Juventude do Projeto Popular,” Levante Popular da Juventude, accessed March 31, 2013, <http://levantepopulardajuventudern.blogspot.com/>.

The increase in human rights activity and amnesty debates could be due to external forces, like trials occurring in neighboring Southern Cone countries and pressure from international organizations like OAS. However, the work of human rights organizations has been targeted by those who oppose their efforts. In July of this year, the human rights organization Torture Never Again (*Tortura Nunca Mais*) was raided and documents relating to the military dictatorship that were being used as part of the mandate of the National Commission of Truth were stolen.<sup>189</sup> This incident suggests that the efforts of human rights organizations are still opposed, and many will challenge efforts to hold the military responsible for crimes committed during the dictatorship.

Limited space for human rights activity has made it difficult for HROs to influence national accountability practices. If they were operating in a society with less repression and fewer dire consequences of calling for justice, it is possible that they would be able to better penetrate decision-making bodies, such as the executive and judiciary. Since they have not been able to do so, their lack of activity has served to fortify amnesty. It is possible to establish justice without human rights activists, but they are often critical in constantly reminding society of the past crimes and their perpetrators' impunity, so that executives and courts are almost forced to acknowledge their presence. If HROs in Brazil can reach that level of activity, amnesty will be harder to maintain.

### **Role of Public Attitudes**

Initially, public support for the 1979 Amnesty Law was salient, more so than in neighboring countries, because it included military concessions. Although it called for

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<sup>189</sup> "Apos ameaca, documentos sao furtados de sede do grupo Tortura Nunca Mais," *Jornal do Brasil*, July 20, 2012, accessed November 3, 2012, <http://www.jb.com.br/pais/noticias/2012/07/20/apos-ameaca-documentos-sao-furtados-da-sede-do-grupo-tortura-nunca-mais/>.



impunity for the crimes committed during the dictatorship, it also excused crimes committed by politically persecuted individuals and restored their political rights.<sup>190</sup> The public not only approved the law but thought it was necessary for restoring democracy. The military maintained favor with the general population by perpetuating the discourse that the opposition posed threats to society's wellbeing.<sup>191</sup> The public accepted the military's influence and control over the transition and in the new democracy as a way to ensure that the military's promises would bring about a consolidation of democracy and a functioning state apparatus.

In the years since democracy took hold, demand for transitional justice measures has been eclipsed by a desire to move forward, with egregious acts becoming part of a more distant past with significant amounts of public forgiveness.<sup>192</sup> A 2010 poll showed that 40% of Brazilians supported establishing accountability while 45% opposed it. Similarly, forty-nine percent felt amnesty was valid while 37% supported assuring individual criminal responsibility.<sup>193</sup> However, recent developments, such as the IACtHR decision and the forthcoming truth commission report may bring transitional justice back to the fore and generate a collective interest in challenging the persistent amnesty.

Because the public is divided on the status quo, their influence in preserving amnesty is not considerable, especially compared with other factors that hold more weight. Brazil has seen little public mobilization or demand for or against amnesty.

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<sup>190</sup> Abrao and Torelly, *Resistance to Change*, 153.

<sup>191</sup> *Ibid.*, 171.

<sup>192</sup> *Ibid.*, 175.

<sup>193</sup> *Ibid.*, 167.

## Role of External Actors

External actors have recently become more involved in Brazil's transitional justice process and have exerted increased influence on domestic actors, such as the judiciary and executive, who have a greater say in the 1979 Amnesty Law's abrogation. Prior to Brazil's transition, it refused to recognize the oversight of any international bodies, limiting the ways in which external actors could influence domestic events.<sup>194</sup> In early 2008, an Italian judge called for the arrest of 146 South Americans who participated in human rights abuses and were suspected in the deaths of 25 Italian citizens. Of those accused, 13 were Brazilians. Although the Brazilians were not extradited for trial, the incident generated backlash from the military, who claimed a small role in Operation Condor, a system of linked Southern Cone countries working together to complete prosecutions. However, it also provided an opportune moment for Paulo Vannuchi, Brazil's secretary for human rights to call for the Amnesty Law's annulment.<sup>195</sup> Similarly to the Pinochet case, the foreign intervention allowed human rights activists to obtain more visibility and support.

Brazil, as a member of OAS, has ratified its American Convention on Human Rights but did not do so until 1992, after it had transitioned to democracy.<sup>196</sup> As an OAS organ, the Inter-American Commission on Human Rights (IACHR) aims to enforce the protection of human rights in the American hemisphere.<sup>197</sup> The human rights

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<sup>194</sup> James Cavallero, "Towards Fair Play: A Decade of Transformation and Resistance in International Human Rights Advocacy in Brazil," *Chicago Journal of International Law* 482 (2002): 482.

<sup>195</sup> "Brazil's Human Rights minister threatens to resign over controversial bill," *MercoPress*, January 11, 2010, accessed November 3, 2013, <http://en.mercopress.com/2010/01/11/brazils-human-rights-minister-threatens-to-resign-over-controversial-bill>.

<sup>196</sup> James Cavallero, "Towards Fair Play," 482.

<sup>197</sup> « Inter-American Commission on Human Rights, » Organization of American States, accessed November 3, 2012, <http://www.oas.org/en/iachr/mandate/what.asp>.

organizations used this outlet to bring to light Brazil's persistent Amnesty Law shortly after the Supreme Court's decision. The specific case referred to the disappearances of 70 people in the Para state who were part of the Araguaia guerilla force between 1972 and 1975. The present-day government suggested that the Supreme Court ruling from April should be respected as "the Brazilian Judiciary is one of the most independent and autonomous of the world."<sup>198</sup> The Inter-American Court of Human Rights (IACtHR) contended that:

"...all amnesty provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary executions and forced disappearance, all prohibited because they violate non-revocable rights recognized by international human rights law."<sup>199</sup>

According to Votoria Gabrois, a relative of a victim and Vice President of Tortura Nunca Mais, "The lack of information over more than 30 years caused the families of the Araguaia Guerrilla members anguish, suffering and mistrust towards the Brazilian institutions. The [Inter-American] Court's judgment renews our hope in justice."<sup>200</sup> Although the decision cannot be enforced by the IACtHR but must be enforced domestically, this external intervention may show that criminals can and should be punished through courts, expanding the sphere of possibility. Furthermore, the IACtHR decision and the Italian arrest warrants may help galvanize the public and encourage them to call for their domestic government to take control of these cases as opposed to an

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<sup>198</sup> « Lei da Anistia e debatida em julgamento do Brasil na Corte da OEA, » *Folha de S. Paulo*, May 21, 2010, accessed December 5, 2012, <http://www1.folha.uol.com.br/folha/brasil/ult96u738985.shtml>.

<sup>199</sup> « Statement on the Duty of the Haitian State to Investigate the Gross Violations of Human rights Committed during the Regime of Jean-Claude Duvalier, » Organization of American States, May 17, 2011, accessed November 3, 2012, <http://www.oas.org/en/iachr/docs/other/Haiti2011.asp>.

<sup>200</sup> « Brazil, » Center for Justice and International Law.

external system adjudicating their own crimes. Finally, as was the case in Argentina, the IACtHR decision may provide grounds and justification for the Supreme Court to revoke the Amnesty Law.

However, efforts soon after the IACtHR decision to try former military officials were thrown out by judges who cited the 1979 Amnesty Law.<sup>201</sup> In a potentially groundbreaking case, in late August 2012, a judge accepted a complaint against two Army officials and was able to justify it without jeopardizing the Amnesty Law of 1979. Judge Nair Pimenta de Castro of Para decided to accept the case based on the permanency argument: that because the bodies of those disappeared were never found, the cases are unresolved and do not fall within the time frame covered by the Amnesty Law (1964-1985). Similarly, in October, Judge Edydio Helio Nogueira de Matos accepted a complaint against Colonel Carlos Alberto, citing the IACtHR's decision and using the permanency argument.<sup>202</sup> The outcome of this case remains to be seen, but it has the potential to set a precedent and facilitate the prosecution of human rights violators on this premise. This outcome would be similar to that which occurred in Argentina, where human rights organizations determined that the Argentine amnesty law did not cover crimes such as kidnapping of minors and changing their identities, and courts were able to prosecute some members of the military dictatorship.<sup>203</sup> However, even with this exception, many who committed human rights crimes are not punishable, because the bodies of those killed were found.

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<sup>201</sup> „Brazil judge rejects attempt to try former army colonel,“ *BBC*, March 16, 2012, accessed December 5, 2012, <http://www.bbc.co.uk/news/world-latin-america-17409931>.

<sup>202</sup> „Justica acata acao contra Ustra por sequestro em 1971,“ *Veja*, October 25, 2012, accessed November 3, 2012, <http://veja.abril.com.br/noticia/brasil/justica-acata-acao-contra-ustra-por-sequestro-em-1971>.

<sup>203</sup> „Statement on the Duty“

The lack of external influence provides a compelling explanation for amnesty's persistence. Soon after the IACtHR condemned the Amnesty Law, it was cited to justify accountability measures, suggesting that domestic actors are cognizant of external influences and their ability to use those influences domestically. If this decision had come sooner, it is likely that it would have been invoked in such a way earlier. Nevertheless, external influence alone is not enough to abrogate amnesty; these influences must be reinforced by domestic actors. If external pressure is kept up, however, it is likely that domestic actors with the power to establish accountability will be forced to respond.

### **Scale of Human Rights Violations**

Although the Brazilian military regime lasted from 1964-1985, longer than most other Southern Cone military dictatorships, the scale of deaths in Brazil was much smaller than that in Argentina or other geographically close nations.<sup>204</sup> An estimated 300-500 people were disappeared and executed during that period, compared with thousands in Chile and Argentina.<sup>205</sup> Brazil also had fewer exiles and a similar number of political prisoners as its neighbors. The lower figures could be interpreted in two ways. First, the level of repression, which was relatively low, meant that a smaller portion of society was affected by the military regime and therefore less likely to mobilize and call for amnesty. Alternatively, the low level of repression and smaller number of victims indicates that establishing accountability may have required less logistical coordination to carry out accountability measures. In Brazil's case, it seems that since the country experiences a

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<sup>204</sup> "Truth Commission Digital Collection," United States Institute of Peace, accessed November 3, 2012, <http://www.usip.org/publications/truth-commission-digital-collection>

<sup>205</sup> Eric Wiebelhaus-Brahm, "What Does Brazil Have to Gain from a Truth Commission after Two Decades of Democracy?" presented at the International Conference on the Right to Truth, Sao Paulo, Brazil, October 19-20, 2009.

relatively higher level of repression during peacetime, the human rights violations carried out by the military regime were less startling to the public, and amnesty was more easily established and protected. When societies with a wide-range of repression maintain amnesty, the scale/scope explanation likely does not hold primary influence, but rather serves to reinforce factors already at play.

## **Conclusion**

Brazil's negotiated transition in 1985 created a new democracy that served the interests of the outgoing military regime. They were guaranteed amnesty and their policies were resilient due to a lack of institutional reform. The culture of impunity may have also helped create a society with high levels of repression that made human rights activism difficult. Their influence is still potent today, and as they remain opposed to accountability, measures to challenge impunity must overcome the military's resistance.

Although the scale of violence was smaller than neighboring countries, making trials (were they to happen) less of a logistical nightmare, the public remains disinterested in establishing accountability, especially as more time lapses since crimes were committed. More importantly, the judiciary and executive, those with real influence in overturning the Amnesty Law, have thus far voiced their support for upholding it. As such, efforts by human rights organizations and external actors, which have been critical to establishing trials in Argentina, have not yet been able to successfully penetrate these bodies in the quest for accountability.

This said, activity by human rights organizations and external actors has been on the rise. Human rights organizations have reached out to international bodies for assistance, such as the IACHR. They have also begun innovative shaming tactics, like

esculachos, that are likely to generate more public attention. Furthermore, external actors have become engrossed in Brazil's impunity. Foreign trials have been initiated and the IACtHR has declared amnesty incompatible with international human rights law.

Whether or not these recent developments have any implications on Brazil's amnesty has yet to be seen.

## CHAPTER 4: ARGENTINA CASE STUDY

### Introduction

The Escuela Superior de Mecánica de la Armada (ESMA) was a school for military instruction in Buenos Aires prior to the 1976 military coup. After that, ESMA functioned as a clandestine torture center that imprisoned around 5,000 people. Although it remained in use as a military operating center after democracy returned in 1983, in 2002, it was declared an Institute of Memory. In 2004, President Nestor Kirchner called ESMA a “Space for the Memory, Promotion and Defense of Human Rights.”<sup>206</sup> Since then, ESMA has evolved into a museum, cultural center, and space for academic discourse.

Today, those who committed torture at ESMA are facing prosecution through domestic, public, and oral trials in Buenos Aires. ESMA now serves as a location where these developments can be discussed, celebrated, and critiqued. At a conference held at ESMA in Fall 2011, Eduardo Duhalde, Argentina’s late Secretary for Human Rights, praised Argentina for holding the military regime accountable through domestic courts, rather than an international tribunal, saying that those participating in the trials “are the judges of the Constitution, those that are judging the responsibility of crimes against humanity and applying the penal code. These are not special dictators. These are oral and public trials that allow national control of the process, and at the same time, guarantee the same justice in all cases.”<sup>207</sup> Undersecretary for Human Rights, Luis Alen had similar

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<sup>206</sup> “Escuela Superior de Mecánica de la Armada (ESMA),” Memoria Abierta, accessed March 31, 2013, [http://www.memoriaabierta.org.ar/camino\\_al\\_museo3.php](http://www.memoriaabierta.org.ar/camino_al_museo3.php).

<sup>207</sup> MERCOSUR, “Perspectivas comparadas.”



views, stating, “The trials that are taking place now are oral and public. We understand the necessity of this publicity as part of the process of democratizing and allowing reflection so that these terrible experiences never happen again in the future.”<sup>208</sup>

Words like these, as well as symbolic gestures such as converting torture centers to human rights memorials, demonstrate Argentina’s approach to transitional justice, one which, although delayed and imperfect, is characterized by domestic control of the process, pride in its development, and an ongoing quest to return to normalcy. In Argentina, executive and judiciary actions have largely determined the introduction and persistence of amnesty. However, international actors, notably the IACHR and foreign courts, as well as innovative and dedicated human rights organizations have successfully influenced the executive and judicial branches, helping to establish individual accountability, which Argentina has pursued since 2005.

## **Background**

In March of 1976, military officers Rafael Videla, Emilio Eduardo Massera, and Orlando Ramon Agosti assumed government control through a coup d’etat. Many Argentines supported this transfer of power, due to a debilitating economic crisis, increased political radicalization, and a lack of executive leadership. Therefore, when the military junta promised to re-establish order, many supported their efforts. As part of this transformation, the military government commenced a “Process of National Reorganization” with the ultimate objective of eliminating potential societal threats, just

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<sup>208</sup> Ibid.

as the dictatorship in Brazil and the other Condor Plan parties aimed to do.<sup>209</sup> Since the military junta adhered to the national security doctrine in a Cold War environment, the armed forces believed they should defend the country from both external and internal enemies, guerilla groups like the Montoneros and the Ejercito Revolucionario del Pueblo (ERP) became obvious targets.<sup>210</sup> Both these guerilla groups emerged around 1970 in the shadow of the Cuban Revolution and espousing similar leftist ideologies.<sup>211</sup> The Montoneros employed violent tactics to achieve their goals which often aligned with Juan Perón's populist ideology, and included creating a revolution by expelling "infiltrators and traitors," a title applied to politicians, labor leaders, and business people.<sup>212</sup> The ERP consisted of Trotskyite adherents and similarly utilized militant tactics to establish proletarian rule.<sup>213</sup> But even after these two groups had been effectively decimated, the military government also attempted to silence the demands of workers, political organizations, the middle class, and students, and to do so, they took absolute control of the state.<sup>214</sup> Through the state security apparatus, the government intimidated dissidents and immobilized civil society. Repression was executed in four distinct categories: sequestration, torture, detention, and execution.<sup>215</sup> Victims were imprisoned in more than 340 clandestine torture centers throughout Argentina where they were often executed and disappeared, and their bodies were disposed of in the Rio de la Plata.<sup>216</sup> From 1976-1983, an estimated 30,000 people were disappeared and 500 children born under captivity were

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<sup>209</sup> Luis Alberto Romero, *A History of Argentina in the Twentieth Century*, (University Park, PA: The Pennsylvania State University Press, 2002), 215.

<sup>210</sup> *Ibid.*, 218.

<sup>211</sup> *Ibid.*, 189.

<sup>212</sup> *Ibid.*, 211.

<sup>213</sup> *Ibid.*, 210.

<sup>214</sup> *Ibid.*, 219.

<sup>215</sup> *Ibid.*, 217.

<sup>216</sup> Martin Edwin Andersen, *Dossier Secreto: Argentina's Desaparecidos and the Myth of the "Dirty War"* (Boulder: Westview Press, 1993), 205.

appropriated according to human rights organizations, 108 of whom have recovered their identities.<sup>217</sup> Official reports suggest lower numbers of disappearances: 13,000.<sup>218</sup> To obtain complete control of the society, the military junta utilized fear to create a society lacking means of expression and ways to protest. The press was censored, and political and union action was prohibited. During this time, however, human rights organizations began to mobilize, especially those whose members were the relatives and friends of victims, such as Madres de la Plaza de Mayo, Center for Legal and Social Studies (CELS), the Ecumenical Movement for Human Rights, and the Peace and Justice Service (SERPAJ).<sup>219</sup> These groups faced immense repression and utilized creative tactics to call attention to the military regime's repression, such as reaching out to international organizations.<sup>220</sup>

Eventually, due to a strengthened opposition movement, internal disagreements among the armed forces, and an economy plagued by unsustainable external debt, high inflation, and a devalued peso, the dictatorship began to be discredited.<sup>221</sup> In an effort to thwart what seemed to be inevitable destruction, the dictatorship, led by General Leopoldo Galtieri, attempted to take control of the disputed Malvinas Islands to demonstrate domestic fortitude.<sup>222</sup> However, Great Britain also claimed possession of the islands and had occupied them since 1833.<sup>223</sup> After Argentina invaded, Great Britain drew on support from the European community, the UN Security Council, and the U.S.

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<sup>217</sup> "Niños desaparecidos, Jóvenes localizados 1975-2013," Abuelas de la Plaza de Mayo, last modified January 2013, accessed April 10, 2013, <http://www.abuelas.org.ar/Libro2010/index.php>.

<sup>218</sup> Pablo Calvo, "Una duda histórica: no se sabe cuántos son los desaparecidos," *La Clarín*, June 10, 2003, accessed April 10, 2013, <http://edant.clarin.com/diario/2003/10/06/p-00801.htm>.

<sup>219</sup> Sikkink, *The Justice Cascade*, 83.

<sup>220</sup> Ibid.

<sup>221</sup> Romero, *History of Argentina*, 241.

<sup>222</sup> Ibid., 240.

<sup>223</sup> Ibid., 242.

and easily defeated Argentina, all but forcing Galtieri to resign.<sup>224</sup> The dictatorship had ruptured, and the military had to redefine its objectives: they intended to negotiate a deal with the opposition to ensure their impunity. Before leaving office, they negotiated several conditions such as the Ley de Pacificación Nacional (Law of National Pacification) that guaranteed themselves amnesty for the crimes committed between 1973 and 1982. Unlike in Brazil, the self-amnesty law had no element of compromise and was established in the final days of military rule.

Meanwhile, human rights organizations like the Madres de la Plaza de Mayo were obtaining greater support. They condemned the military's actions, highlighting the crimes committed during the dictatorship and in doing so, creating a sense of solidarity among the Argentine public and a forceful call for justice. In 1983, Raul Alfonsín was democratically elected president. He promised that the military officials responsible for human rights violations would be held accountable for the crimes they committed during the dictatorship.<sup>225</sup> Although Alfonsín could not overturn amnesty himself, he urged the Supreme Court to do so, and in what became typical throughout Argentina's transitional justice process, the executive and Supreme Court views converged to overturn amnesty.<sup>226</sup> In the coming years, the Congress and Supreme Court would repeatedly determine impunity's status, and although the Argentine president does not have the power to do establish or derogate amnesty by himself or herself, he was often influenced by various actors to pressure the judiciary or legislature to overturn or uphold impunity.

After taking office, Alfonsín established the National Commission on the Disappearances of Persons that began investigating the actions of the armed forces during

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<sup>224</sup> Ibid., 244.

<sup>225</sup> Sikkink, *The Justice Cascade*, 70.

<sup>226</sup> Engstrom and Pereira, "From Amnesty to Accountability," 104.

the dictatorship. The Commission published a report called *Nunca Mas* (Never Again) that denounced the crimes against humanity that had occurred between 1976 and 1983. Furthermore, Alfonsín established a justice system to hold the military, Montoneros, and ERP accountable for any crimes committed.<sup>227</sup>

Through civil tribunals, individual members of the armed forces were prosecuted and later found guilty.<sup>228</sup> The military, predictably, responded negatively to their punishment, when over 300 officers were awaiting trial in domestic courts. They staged several coup attempts, and although unsuccessful, the threats they carried pressured Alfonsín to succumb to military demands to preserve the nascent democracy.<sup>229</sup> Alfonsín proposed two laws that essentially granted amnesty to those who committed crimes during the military dictatorship. In 1985, the *Ley de Punto Final* (Final Stop Law) declared that two months after the laws' enactment (it was enacted December 24, 1986), all punitive actions would stop.<sup>230</sup> It was passed by the Argentine congress after support from Alfonsín, although its enactment elicited a surge of subpoenas for members of the military regime until an executive degree called for prosecutions to cease.<sup>231</sup> In addition, the *Ley de Obediencia Debida* (Due Obedience Law) stated that those who were only obeying orders from above would not be subject to punishment and was passed by Congress in June 1987.<sup>232</sup>

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<sup>227</sup> Romero, *History of Argentina*, 262.

<sup>228</sup> Sikkink *The Justice Cascade*, 72.

<sup>229</sup> *Ibid.*, 78.

<sup>230</sup> Ley 23.492, December 23, 1986, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/20000-24999/21864/norma.htm>.

<sup>231</sup> Andrew Brown, "Adios Amnesty: Prosecutorial Discretion and Military Trials in Argentina," *Texas International Law Journal* 37 (2002): 212.

<sup>232</sup> Carlos Acuña and Catalina Smulovitz, "Militares en la Transición Argentina: Del Gobierno a la Subordinación Constitucional" in *La Nueva Matriz Política Argentina*, ed. Carlos Acuña (Buenos Aires: Nueva Visión, 1995), 61.

After Alfonsín's presidency, Carlos Menem was elected president and made further retrogressions with regard to transitional justice by pardoning all those who had been convicted of crimes in 1990.<sup>233</sup> During this period of impunity, however, human rights defenders continued fighting for justice, convincing federal courts to begin truth trials to obtain more information about the events of the dictatorship after the Supreme Court ruled that victims had a "right to truth." Nevertheless, the information they obtained and analyzed resulted in no legal punishments.<sup>234</sup> HROs sought ways to circumvent impunity and were finally rewarded in 2001, when Federal Judge Gabriel Cavallo found that the amnesty laws were "contrary to the fundamental principles of international law."<sup>235</sup> Furthermore, in 2003, President Nestor Kircher supported HRO's activity and accountability measures, and used his influence to help abrogate amnesty.<sup>236</sup> Although this decision was not heard by the Supreme Court until 2005, in August of 2003, the Argentine congress passed a law annulling Ley de Punto Final and Ley de Obediencia Debida. Finally, in June 2005, the Supreme Court declared these same laws unconstitutional in a 7-1 decision supporting those made in lower courts, reopening the trials that had started and ended during Alfonsín's presidency.<sup>237</sup>

Currently, nearly 300 Argentines have faced trial, the vast majority of whom were found guilty.<sup>238</sup> As the graphs below demonstrate, the numbers of those accused have

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<sup>233</sup> Sikkink, *The Justice Cascade*, 76.

<sup>234</sup> Sikkink, "From Pariah State to Global Protagonist," 13.

<sup>235</sup> Juzgado Nacional en lo Criminal y Correccional Federal 4. Juez Gabriel Cavallo. Causa Nro. 8686/2000 "Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años" del registro de la Secretaría 7. 6 de marzo de 2001. Available at <http://www1.umn.edu/humanrts/research/argentina/jfcc4-cavallo.html>

<sup>236</sup> Steven Levitsky and María Victoria Murillo, "Argentina: From Kirchner to Kircher," *Journal of Democracy* 19 (2008): 18.

<sup>237</sup> *Ibid.*, 79.

<sup>238</sup> "Derechos humanos en Argentina: Informe 2012," Centro de Estudios Legales y Sociales, accessed March 31, 2013, <http://www.cels.org.ar/common/documentos/Informe2012.pdf>.

been rising, as have convictions. Most of those accused are accused of torture, deprivation of liberty, or homicide.

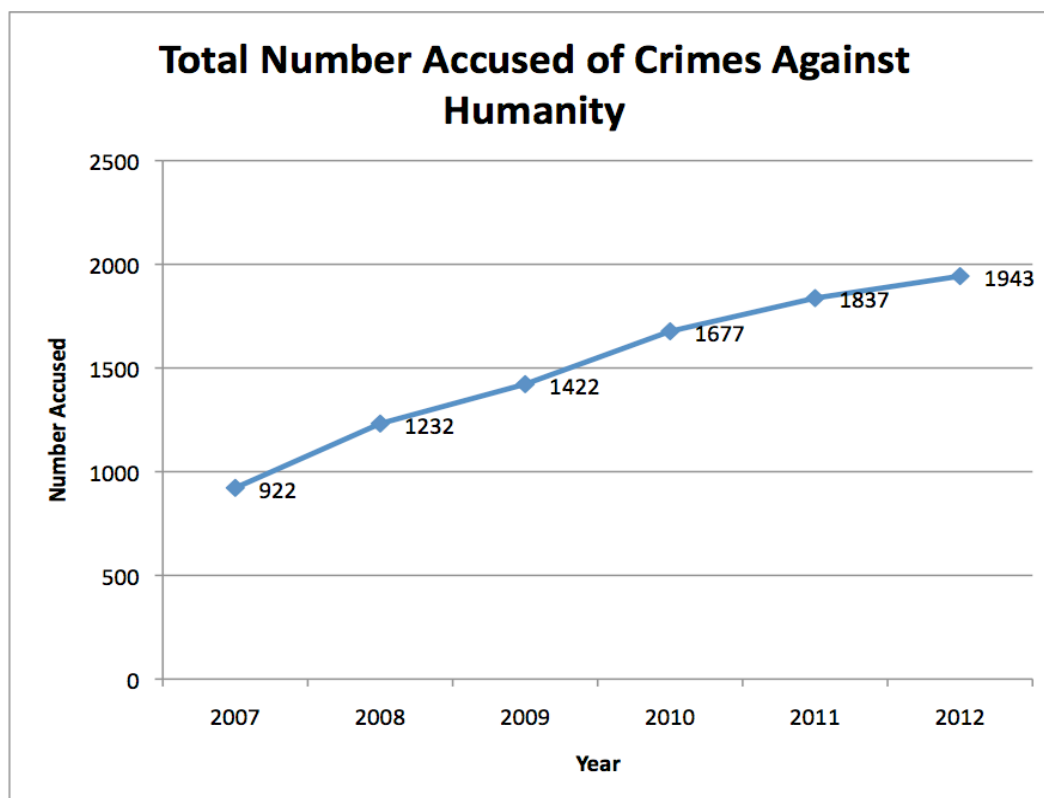


Figure 1. Total Number Accused of Crimes Against Humanity, Cumulatively. CELS Informe 2012.

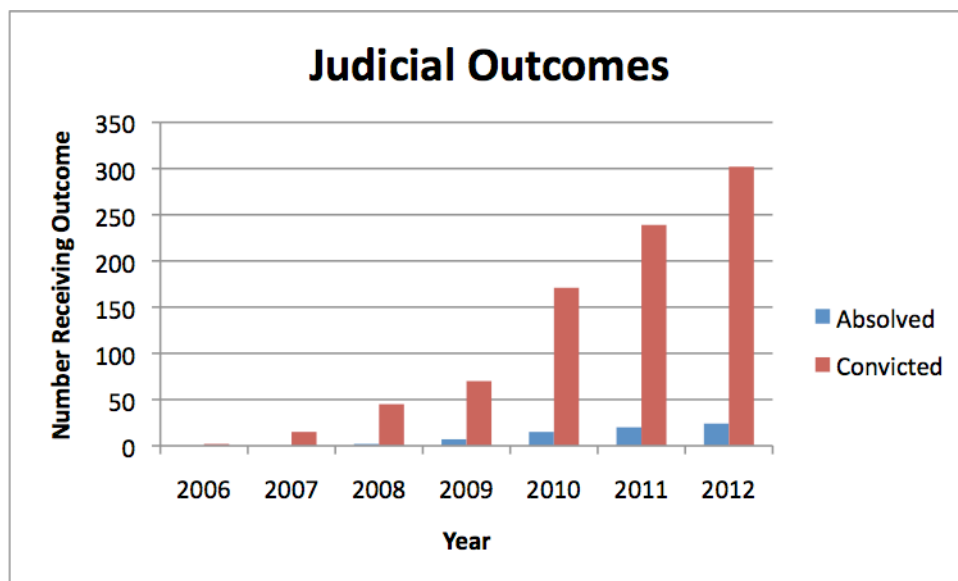


Figure 2. Judicial Outcomes. CELS Informe 2012.

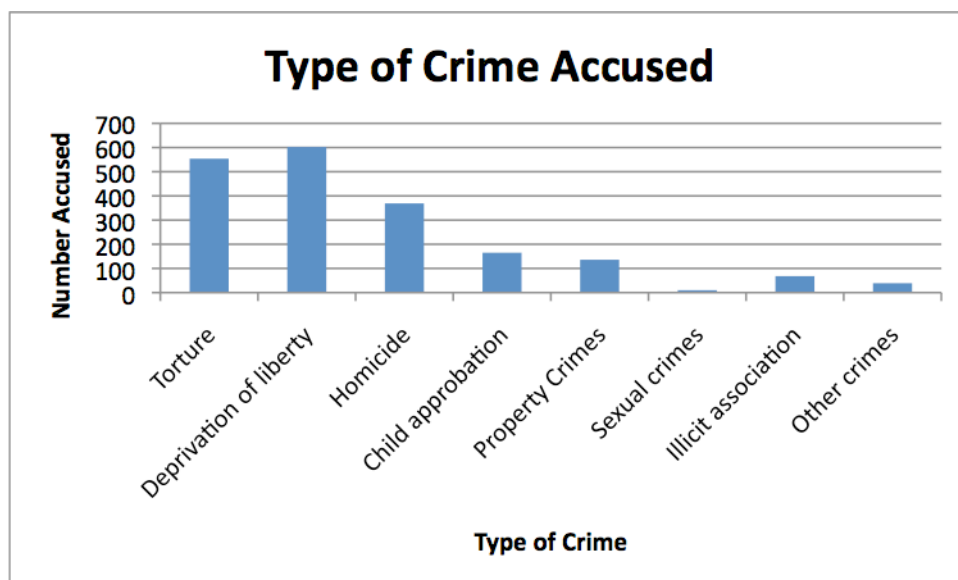


Figure 3. *Type of Crime Accused, CELS Informe 2012.*

Although the trials are moving forward in Argentina, HROs, Argentines, and International Organizations note their flawed nature. The Center of Legal and Social Studies (CELS) mentions, among other obstacles, the difficulties presented by a lack of physical space to carry them out. In Buenos Aires, only one courtroom has been set aside to adjudicate the hundreds of trials, thereby slowing their pace. As CELS' annual human rights publication states, "Maintaining the present pace, the open cases will take at least 20 years to finish. That will be an eternity for the victims, the charged, and society altogether. It will also pose a risk due to the intrinsic fragility of the process."<sup>239</sup> Human rights organizations also lament the trials' lengthy duration, their lack of media coverage, and government corruption.<sup>240</sup> In the coming pages, I will analyze the influence of a variety of factors in explaining the erratic nature of amnesty in Argentina. I will consider the nature of the transition, the role of the judiciary, the role of the executive, the role of

<sup>239</sup> Ibid.

<sup>240</sup> Graciela Lois, interview by Elsa Voytas, November 24, 2011, San Telmo, Buenos Aires, Argentina., Carmen Lapacó, interview by Elsa Voytas, November 24, 2011, Recoleta, Buenos Aires, Argentina.



human rights organizations, the role of public attitudes, the role of external factors, and the scale of human rights violations to parallel the Brazilian case study. Like I concluded regarding Brazil's approach to amnesty, I will argue that the judiciary is the most influential factor explaining Argentina's introduction and abrogation of amnesty, and that the executive can also play a substantial role. In contrast to Brazil, however, the role of human rights organizations and external actors have yielded significantly greater impacts in impunity's status in Argentina.

### **Nature of Transition**

Argentina's 1983 transition to democracy can be classified as ruptured. A variety of factors delegitimized the military dictatorship prior to President Alfonsín's election. In 1979, the IACHR visited Argentina to report on its human rights situation, at least partially due to human rights activists' requests.<sup>241</sup> In Brazil, human rights groups did not utilize international regimes as adeptly, likely due to the fact that Brazil had not ratified many inter-American or UN treaties and was therefore not subject to the jurisdiction of many oversight bodies in the way Argentina was.<sup>242</sup> In Argentina, however, the IACHR's 1980 report condemned amnesty, recommending that the government instead, "initiate the corresponding investigations, to bring to trial and to punish, with the full force of the law, those responsible..."<sup>243</sup> The IACHR's recommendation helped bolster and substantiate justice efforts on the part of Argentine HROs.<sup>244</sup> HROs, which were initially

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<sup>241</sup> Sikkink, *The Justice Cascade*, 66.

<sup>242</sup> James Cavallero, "Towards Fair Play: A Decade of Transformation and Resistance in International Human Rights Advocacy in Brazil," *Chicago Journal of International Law* 482 (2002): 482.

<sup>243</sup> "Conclusions and Recommendations," in Report on the Situation of Human Rights in Argentina, Inter-American Commission on Human Rights, 1980, accessed March 31, 2013, <http://www.cidh.org/countryrep/Argentina80eng/conclusions.htm>.

<sup>244</sup> Sikkink, *The Justice Cascade*, 67.

hesitant to demand prosecutions, now had legal basis to do so and did not hesitate to voice their demands during the transition process.

The ruinous domestic economy also helped ensure a ruptured transition. In 1982, inflation measured 165%, the peso had been significantly devalued, and businesses were failing.<sup>245</sup> The military dictatorship's economic mismanagement and allegations of corruption created an Argentine society disillusioned and frustrated with junta control. The ability of the dictatorship to carry out state terrorism and repress domestic society began to erode.

The military was further undermined by an embarrassing performance in the Malvinas/Falklands war in 1982. As noted earlier, in a final effort to regain legitimacy, the dictatorship attempted to gain control over the islands, believing that the United Kingdom would give in without a fight. Argentina severely underestimated the opposition they would face: the UK responded militarily with assistance from NATO allies. Furthermore, young Argentine soldiers were inadequately prepared, and the military was undermined.<sup>246</sup>

Taken together, the IACHR report, the disastrous economic conditions, and most importantly, Argentina's pathetic defeat in the Falkland/Malvinas Island delegitimized the military to the extent that their control over the transition was minor at best. Nonetheless, before democracy's return, the military managed to enact a self-amnesty law to protect those who committed crimes between 1973 and 1982.<sup>247</sup> The law was met

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<sup>245</sup> Inter-American Development Bank, "Economic and Social Progress in Latin America: 1991 Report," Washington, D.C.: Johns Hopkins University Press, 1991), 29.

<sup>246</sup> Sikkink, *The Justice Cascade*, 69

<sup>247</sup> Par Engstrom and Gabriel Pereira, "From Amnesty to Accountability: The Ebbs and Flows in the Search for Justice in Argentina," in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, (New York: Cambridge University Press, 2012), 98

with great resistance from human rights advocates. Forty thousand Argentines marched in Buenos Aires to protest the law.<sup>248</sup> CELS and the Buenos Aires Lawyers' Association initiated efforts to weaken the law in court.<sup>249</sup> The new president, Alfonsín, sought to annul the self-amnesty law and although he himself did not have the jurisdiction to overturn the self-amnesty law, he successfully navigated its abrogation through the Argentine Congress in December 1983.<sup>250</sup> Although the military felt threatened by this action, their severe societal disgrace prevented them from generating considerable opposition.<sup>251</sup> The ruptured transition resulted in an eroded amnesty and efforts to establish accountability.

The disgraced military's retreat also meant that the new democratic administration could distance itself from the oppressive tactics of the state apparatus. President Alfonsín established a truth commission, the National Commission on the Disappeared (CONADEP). CONADEP produced a report detailing the crimes during the dictatorship called *Nunca Más* (Never Again) compiled by interviewing victims, family members, and military and police forces,<sup>252</sup> similar to the strategies now being utilized in Brazil's Truth Commission. The report was a national best-seller and was used in the ongoing military trials.<sup>253</sup> Alfonsín also embarked on institutional reform, purging the judiciary and issuing reparations, a process that did not occur in Brazil.<sup>254</sup> Because the military was so undermined by the ruptured transition, Alfonsín and human rights advocates were able to take advantage of the military's disgrace to begin efforts toward accountability. Many

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<sup>248</sup> Sikkink, *The Justice Cascade*, 71.

<sup>249</sup> Engstrom and Pereira, "From Amnesty to Accountability," 99

<sup>250</sup> Ibid.

<sup>251</sup> Brown, "Adios Amnesty," 211.

<sup>252</sup> Pereira, *Political (In)Justice*, 166

<sup>253</sup> Emilio Crenzel, "Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice," *The International Journal of Transitional Justice* 2 (2008), 173.

<sup>254</sup> Pereira, *Political (In)Justice*, 166

military officers were initially prosecuted after this transition even though Alfonsín's Ley de Punto Final (Final Stop) and Ley de Obediencia Debida (Due Obedience) and President Menem's pardons to military officers thwarted transitional justice progress. These measures will be discussed below.

Therefore, the ruptured transition poses a stark contrast to the military's negotiated exit from power in Brazil. As such, the military was delegitimized, making institutional reform and initial prosecutions were more feasible.

### **Role of the Judiciary**

The role, position, and influence of the military evolved significantly from the initial transition to the present. When Alfonsín took office, he purged the judiciary, appointing justices who were considered autonomous, but who supported Alfonsín's accountability efforts.<sup>255</sup> He did so by selecting young, inexperienced judges who were uninvolved, and thus not disgraced, by the military regime.<sup>256</sup> Nevertheless, when Alfonsín curtailed prosecutions with his Ley de Obediencia Debida, the Supreme Court upheld the law's legitimacy, exculpating the military officers facing trial and arguing that the context within which the law was passed needed to be considered and interpreted as an effort to prevent another military coup and consolidate the inchoate democracy.<sup>257</sup>

When President Menem became president in 1989, he expanded the Supreme Court from five justices to nine, and the court tended to defer to the executive and uphold his interests, and at times even displayed "complete subordination" while they expanded presidential power, abandoned established procedures, and tended to side with the

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<sup>255</sup> Engstrom and Pereira, "From Amnesty to Accountability," 102-103.

<sup>256</sup> Pereira, "Political Injustice," 167.

<sup>257</sup> Ibid., 106.

government.<sup>258</sup> Since President Menem was an advocate of impunity as demonstrated by his pardoning of convicted military officers, during his presidency, the court largely adhered to Menem's amnesty policy.<sup>259</sup>

Eventually, however, the Court began to make modest efforts toward weakening the existing blanket amnesty. These advances may have been in part motivated by foreign countries like France and Spain invoking universal jurisdiction to try Argentine nationals. Perhaps in efforts to evade international pressure, Argentine judges sent ex-President General Videla and Admiral Massera back to prison even after Menem had pardoned them for the crime of stealing babies.<sup>260</sup> Kidnappings of this nature were not covered by the Ley de Obediencia Debida, and the Argentine Supreme Court adopted the position that such crimes were crimes against humanity, and therefore not covered by the Argentine Criminal Code.<sup>261</sup> Additionally, through the Lapacó case in 1998, the Supreme Court recognized victims' right to truth and established truth trials, but asserted that establishing truth should not be done through criminal trials.<sup>262</sup>

In March 2001, a Buenos Aires judge, Gabriel Cavallo directly challenged Alfonsín's Full Stop and Due Obedience Laws, declaring them unconstitutional and incompatible with international treaties.<sup>263</sup> His ruling was upheld by the Argentine Chamber of Appeals which suggested that, "There is no doubt that the Supreme Court is

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<sup>258</sup> Jonathan Miller, "Evaluating the Argentine Supreme Court Under Presidents Alfonsín and Menem (1983-1999), *Southwestern Journal of Law and Trade in the Americas* 7 (2000), 373-399.

<sup>259</sup> Engstrom and Pereira, "From Amnesty to Accountability," 108.

<sup>260</sup> Sikkink, *The Justice Cascade*, 78.

<sup>261</sup> Maria Jose Guembe, "Reopening of Trials for Crimes Committed by the Argentine Military Dictatorship," *Sur Revista Internacional de Direitos Humanos* 2 (2005), [http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S1806-64452005000200008&lng=en&nrm=iso&tlng=en#tx09](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1806-64452005000200008&lng=en&nrm=iso&tlng=en#tx09).

<sup>262</sup> Ibid.

<sup>263</sup> Engstrom and Pereira, "From Amnesty to Accountability," 112.

under a special obligation to impose respect for the fundamental human rights, since, within its sphere of competence, the Tribunal represents national sovereignty.”<sup>264</sup>

When President Kirchner took power in 2003, he implemented significant judiciary reform. He encouraged Congress to begin the impeachment process for Menem’s appointments who had demonstrated total executive deference, established public hearings for future justice nominations, and made Supreme Court action more transparent.<sup>265</sup> In 2004, the Supreme Court argued against impunity laws in the Arancibia Clavel case, claiming that even though Argentina ratified the UN Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity only in 2003, its provisions could be applied to crimes committed prior to ratification because the principles established in the treaty were already well-established during the military dictatorship.<sup>266</sup> Soon after, in June 2005, the Supreme Court declared the Full Stop and Due Obedience Laws unconstitutional in a 7-1 vote, reopening cases and the possibility of prosecution.<sup>267</sup>

In sum, like in Brazil, the Argentine judiciary has been critical in Argentina’s approaches to amnesty. Originally, it acted chiefly in line with the executive branches of Alfonsín and Menem, largely supporting first accountability and then amnesty. However, it began to be pressured and sometimes circumvented by other influential bodies, such as foreign courts, international treaties, and HROs, and judges like Judge Gabriel Cavallo began to weaken amnesty. Ultimately, it was the Supreme Court in 2005 that allowed

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<sup>264</sup> Ibid., 113.

<sup>265</sup> Alba M. Ruibal, “Self-Restraint in the Search for Legitimacy: The Reform of the Argentine Supreme Court,” *Latin American Politics and Society* 51 (2009), 67, Steven Levitsky and María Victoria Murillo, “Argentina: From Kirchner to Kircher,” *Journal of Democracy* 19 (2008): 17.

<sup>266</sup> Guembe, “Reopening of Trials”.

<sup>267</sup> Sikkink, *The Justice Cascade*, 79.

prosecutions to restart and continue today. In other words, the judiciary is instrumental in the introduction and persistence of amnesty laws. However, the Court is subject to influence by a range of other forces, as we shall see below.

### **Role of the Executive**

The executive branch has played instrumental roles in amnesty's persistence since Argentina's transition. Initially, President Alfonsín was elected to steer the democratic transition, and he immediately began working to distance his administration from the repressive tactics of preceding regimes. Not only did he spearhead efforts to abrogate the military's self-amnesty, he also established a truth commission and led a purge of the judicial system.<sup>268</sup> However, the extent to which the executive influenced amnesty's status was evident when Alfonsín lobbied for the passage of the Ley de Punto Final and the Ley de Obediencia Debida, essentially re-establishing amnesty for the former dictatorship.<sup>269</sup> Although Alfonsín was pressured to weaken individual accountability by potent coup attempts, the sheer quantity of officers awaiting prosecution, and his desire to move reconciliation efforts forward, his decision to push forward the amnesty laws could have been easily overturned by the Supreme Court. Because it instead supported the executive's justification for establishing amnesty, it is possible that the judiciary acted in deference to the executive. This decision suggests that Alfonsín's actions carried significant influence even among a body that could easily hamper executive impact regarding the persistence of amnesty. Throughout Alfonsín's administration, the judiciary

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<sup>268</sup> Pereira, *Political (In)Justice*, 166.

<sup>269</sup> Ibid.

largely followed the executive's lead, implementing Alfonsín's preferences in their rulings.<sup>270</sup>

If Alfonsín eroded accountability, his successor, Carlos Menem eradicated it. He was able to ensure amnesty for those who were convicted through the initial trials and he helped preserve its continuity by expanding the Supreme Court and appointing justices who shared his views.<sup>271</sup> In doing so, he was able to influence Supreme Court rulings so that they too would preserve amnesty.

In between Menem and Kirchner, the suffering economy seemed to be the focus of domestic politics. None of the interim presidents made efforts to weaken amnesty, and some, like President Fernando de la Rúa, banned Argentine citizens' extradition for foreign trials, thereby thwarting international accountability efforts.<sup>272</sup>

President Kirchner, however, who came to power after a string of brief presidents presiding over a ruined economy, was a staunch human rights activist. Soon after taking office, Kirchner annulled de la Rúa's extradition ban, reopening the possibility of foreign trials.<sup>273</sup> Kirchner reformed the Supreme Court so that the judicial branch was more amenable to annulling amnesty, impeaching six of the nine justices appointed by Menem who supported amnesty and lobbying his appointees to overturn the Ley de Obediencia Debida and Punto Final.<sup>274</sup> He identified all Argentineans as "the sons and daughters of the Mothers and Grandmothers of the Plaza de Mayo" before the UN General

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<sup>270</sup> Engstrom and Pereira, "From Amnesty to Accountability," 105

<sup>271</sup> Pereira, *Political (In)Justice*, 167

<sup>272</sup> Larry Rohter, "World Briefing: Americas: Argentina: Human Rights Extraditions," *New York Times*, December 25, 2001, accessed March 31, 2013, <http://www.nytimes.com/2001/12/25/world/world-briefing-americas-argentina-human-rights-extraditions.html>.

<sup>273</sup> Terence Roehrig, "Executive Leadership and the Continuing Quest for Justice in Argentina," *Human Rights Quarterly* 21 (2009), 734.

<sup>274</sup> Levitsky and Murillo, "Argentina: From Kirchner to Kirchner," 18.



Assembly.<sup>275</sup> Kirchner's administration ratified the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, stating that there were no statutes of limitation for crimes against humanity, and requested that Congress uphold it even despite contradictory domestic laws.<sup>276</sup> Kirchner supported the "Memory, Truth, and Justice" campaign of HROs, a new, three-pronged approach to transitional justice evocative of the campaign initiated by Lula in Brazil. Kirchner supported this effort by recognizing memorial sites, including a converted military school in a powerful gesture of civilian dominance over the military.<sup>277</sup> He took steps to ensure that his actions would not create the same military backlash Alfonsín faced; he purged high-level military officials when he took office and appointed younger officers in their place.<sup>278</sup>

Kirchner's actions created a propitious environment for amnesty abrogation. In August 2003, Congress annulled the impunity laws.<sup>279</sup> The annulment was validated by the 2005 Supreme Court decision, a ruling that Kirchner said had "given our country a ruling that renews our faith in the system of justice. [The Court has] declared unconstitutional [laws] that filled us with shame."<sup>280</sup>

Although Kirchner's presidency undoubtedly yielded significant human rights victories, the context under which he was operating influenced his actions. He took power in the midst of persistent leadership failure and economic tumult, and he was able

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<sup>275</sup> Engstrom and Pereira, "From Amnesty to Accountability," 114.

<sup>276</sup> Ibid.

<sup>277</sup> Ibid.

<sup>278</sup> Terence Roehrig, "Executive Leadership," 734.

<sup>279</sup> "Disputados aprobó la anulación de las leyes de perdón," *La Nación*, August 12, 2003, accessed April 3, 2013, <http://www.lanacion.com.ar/518793-diputados-aprobo-la-anulacion-de-las-leyes-de-perdon>.

<sup>280</sup> Terence Roehrig, "Executive Leadership," 739.

to consolidate legitimacy by appealing to the broad base of accountability supporters.<sup>281</sup> He recognized the efforts of HROs and, by putting his weight behind their efforts, was able to achieve significant advances in the areas of amnesty annulment, prosecution reopenings, and memory site creation. When Nestor Kirchner's wife Cristina succeeded him, she adopted similar views toward the necessity of establishing accountability and has supported hastening the speed of prosecution.<sup>282</sup>

Amnesty's status has largely aligned with executive preferences. When Alfonsín supported accountability, prosecutions began, but when he began to fear their implications, his Ley de Punto Final and Ley de Obediencia Debida ensured impunity. Menem, de la Rúa, and Duhalde all supported and further strengthened amnesty. Nestor Kirchner, perhaps in an attempt to consolidate support from the human rights cohort, facilitated impunity's annulment by first weakening it, altering the Supreme Court composition, pressuring Congress to declare amnesty unconstitutional, and recognizing the requests of HROs. Today, accountability persists, as does its executive support with Nestor Kirchner's wife and successor, Cristina. Therefore, the preferences of the executive branch have been a powerful predictor in the strength of amnesty in Argentina, especially when the President Kirchner became determined to establish accountability and took measures to facilitate that process. Executives have successfully manipulated its status either directly, by influencing the Supreme Court, or through a variety of other measures meant to thwart or establish prosecutions. Nevertheless, the judicial and

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<sup>281</sup> Pereira and Engstrom, "From Amesty to Accountability," 115.

<sup>282</sup> "Cristina comparó a los crímenes de la dictadura con el Holocausto," *Perfil*, February 6, 2002, accessed April 10, 2013. [http://www.perfil.com/contenidos/2007/02/06/noticia\\_0005.html](http://www.perfil.com/contenidos/2007/02/06/noticia_0005.html), Levitsky and Murillo, "Argentina: From Kirchner to Kirchner," 18.

legislative branches could have acted against executive preferences and have a more conclusive say in amnesty's status.

### **Role of Human Rights Organizations**

Human rights organizations, too, have had a tremendous influence on the introduction and persistence of amnesty, largely due to their ability to compel decision-making bodies to represent their interests. They have used courageous and innovative strategies to establish and re-establish accountability procedures and continue to do so today.

Elizabeth Jelin notes the heterogeneity of the human rights movement. She divides HROs into those directly affected by the violence and those which were unaffected.<sup>283</sup> These organizations developed diverse strategies, memberships, and objectives. Notably, in 1976, 14 women met outside the president's house, where the president resides, in the Plaza de Mayo. These women demanded disclosure of their children's whereabouts, who had been disappeared. In 1977, they became the Madres de la Plaza de Mayo, originally attempting to raise consciousness while resisting state terrorism's oppressive policies.<sup>284</sup> The Madres came to be easily recognized; the Plaza de Mayo became a nucleus for human rights advocacy and their white bonnets, which symbolized their disappeared children's diapers, became a symbol of their movement. The Madres were the target of repression; three of them were disappeared and killed.<sup>285</sup>

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<sup>283</sup> Elizabeth Jelin, "The Politics of Memory: The Human Rights Movement and the Construction of Democracy in Argentina," *Latin American Perspectives* 21 (1994), <http://www.latinamericanstudies.org/argentina/human-rights.pdf>.

<sup>284</sup> Natalia Carolina Marcos, "La memoria insurgente de las madres de la plaza de mayo," *Anuario de acción humanitaria y derechos humanos* 5 (2008), 88.

<sup>285</sup> "Who We Are," *Madres de Plaza de Mayo Liñea Fundadora*, November 9, 2010, accessed March 31, 2013, <http://www.madresfundadoras.org.ar/pagina/whoweare/85>.

As a Madre, Carmen Lapacó says, “We were always acting, always thinking of new things, always with danger”.<sup>286</sup> The Madres participated in early calls for justice while other groups felt doing so was too dangerous, as it was essentially advocating punishment of those who were still in power.<sup>287</sup> They also advocated for external intervention, particularly the onsite IACHR visit in 1979.<sup>288</sup> The Madres de la Plaza de Mayo called for accountability during the democratic transition and continued their fight even after the disheartening setback of the impunity laws.

In 1986, the Madres split into two groups due to divergent leadership ideas.<sup>289</sup> Nevertheless, they continued their attention-grabbing and innovative mobilization tactics throughout the period of impunity. They embarked on innovative legal challenges to the amnesty laws. The Abuelas of the Plaza de Mayo, linked to the Madres, argued that kidnapping babies and placing them with allies of the military junta fell outside the scope of Ley de Punto Final and Ley de Obediencia Debida. They were able to circumvent the amnesty laws, initiating some prosecutions despite the persistent impunity in most cases.<sup>290</sup> Today, they continue to operate and still march every Thursday in the Plaza de Mayo in the quest for memory, truth, and justice.

HIJOS, also a group directly affected by the military regime’s oppressive tactics, has had a profound impact on the erosion of amnesty. At an Argentine university in 1995, several students realized they were the sons or daughters of those who were the victims of human rights violations during the dictatorship. With the initial intention of getting

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<sup>286</sup> Lapaco, interview.

<sup>287</sup> Sikkink, *The Justice Cascade*, 68

<sup>288</sup> “Who We Are”

<sup>289</sup> Fernando Bosco, “Human Rights Politics and Scaled Performances of Memory: Conflicts Among the Madres de Plaza de Mayo in Argentina,” *Social and Cultural Geography* 5 (2004), 384.

<sup>290</sup> Sikkink, *The Justice Cascade*, 77.

together to exchange experiences, they called themselves “Hijos por la identidad y la Justicia contra el Olvido y el Silencio” (Sons/Daughters for the Identity and Justice Against Forgetting and Silence).<sup>291</sup> Their demand for justice was a prime objective and was established explicitly in their title. HIJOS groups formed across Argentina and utilized strategies to establish accountability despite the structural constraints imposed by the amnesty laws.<sup>292</sup>

HIJOS used creative strategies to ensure that Argentina’s persistent amnesty was the subject of public attention. They expanded their efforts to include other Argentines dedicated to establishing justice for the military regime, not just those who had parents who were disappeared, because “it was understood that we are all children of the same history and part of the same state that committed crimes against the whole population.”<sup>293</sup> The objectives of HIJOS were characterized as a fight for identity: the identity of the appropriated children, the political identity of the disappeared, and the identity of the organizations they belonged to. HIJOS fought constantly for justice and social condemnation of those who had committed crimes and were living with the rest of society. According to Ana Oberlin, the impunity of the military officials constituted “an offense for all the victims but also for all the Argentines who had to share the same places and spaces with those who had betrayed all of Argentina.”<sup>294</sup> In 1996, HIJOS began a new tactic, called *escraches*, from the Spanish verb *escrachar*, which means to scratch. This activity consisted in convening outside the home of someone who had been

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<sup>291</sup> “Historia,” HIJOS por la Identidad y la Justicia Contra el Olvido y el Silencia, accessed March 31, 2013, [http://www.hijos-capital.org.ar/index.php?option=com\\_content&view=article&id=19&Itemid=400](http://www.hijos-capital.org.ar/index.php?option=com_content&view=article&id=19&Itemid=400).

<sup>292</sup> Santiago Cueto Rúa, “HIJOS de víctimas del terrorismo de Estado. Justicia, identidad y memoria en el movimiento de derechos humanos en Argentina, 1995-2008,” *Historia Crítica* 40 (2010), 130.

<sup>293</sup> Enrique Pastor, interview by Elsa Voytas. November 25, 2011, Microcentro, Buenos Aires, Argentina.

<sup>294</sup> MERCOSUR, “Perspectivas comparadas.”

involved in the crimes of the dictatorship but was living freely due to the amnesty laws. The escraches were festive events, starkly contrasting with the Madres' somber resistance marches. The protestors would mark the houses with red paint to signify the blood of those who had died during the military regime. Often, the escraches were accompanied by live music and theatrical performances. According to HIJOS, the objective of an escrache was to "expose, reveal in public, bring up the face of a person who intends to go unnoticed."<sup>295</sup>

To a certain extent, escraches were a way to achieve some semblance of justice, in the form of social condemnation. HIJOS suggested that, "If there is no justice, there is 'escrache.'"<sup>296</sup> At the same time, however, the escraches served as a tool to ensure that the fact that amnesty persisted was at the forefront of public awareness and could not be ignored by state institutions that preserved impunity. In this sense, escraches served as a means to pressure actors with the power to revoke amnesty, such as the judiciary or the executive, to do so. This tactic has also been adopted in Brazil recently. For HIJOS, social condemnation did not ensure the justice they desired; instead, "trials are necessary because they show, even today, that those who commit crimes won't remain unpunished."<sup>297</sup> As such, their goal as a HRO was always to restart prosecutions.

The Center for Legal and Social Studies (CELS), a HRO with unaffected membership, also utilized creative strategies to ensure accountability and weaken amnesty. After the military declared self-amnesty in 1983, CELS offered to help victims

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<sup>295</sup> "Comisión Escrache," HIJOS por la Identidad y la Justicia Contra el Olvido y el Silencio, accessed March 31, 2013, [http://www.hijos-capital.org.ar/index.php?option=com\\_content&view=section&layout=blog&id=7&Itemid=407](http://www.hijos-capital.org.ar/index.php?option=com_content&view=section&layout=blog&id=7&Itemid=407).

<sup>296</sup> Enrique Pastor, interview.

<sup>297</sup> Ibid.

challenge the legality of impunity measures.<sup>298</sup> CELS also sought foreign allies, challenging amnesty through the IACHR in 1992 and pressuring for foreign trials.<sup>299</sup> Later, in 1995, CELS successfully argued that victims' relatives had a "right to truth." Through their efforts, truth trials began, which became instrumental in creating a framework that more easily permitted criminal trials to proceed years later.<sup>300</sup>

However, CELS most significant contribution, to ensuring an end to impunity came when they argued the *Símon* case in 2001. Julio *Símon* was charged with the forced disappearance and death of two parents, the appropriation of their child, and the changing of the child's identity.<sup>301</sup> CELS compellingly argued that, under the amnesty laws, *Símon* could be found guilty and punished for kidnapping the child, but not for disappearing and murdering the parents.<sup>302</sup> Further, they argued that the Full Stop and Due Obedience Laws violated Argentina's international agreements.<sup>303</sup> They bolstered their arguments by soliciting amicus briefs from Amnesty International, Human Rights Watch, and the International Commission of Jurists in support of accountability.<sup>304</sup> In 2001, Judge Cavallo found their case convincing, and the argument was ultimately the one heard before the Supreme Court in 2005 when it declared amnesty laws unconstitutional.<sup>305</sup>

CELS was instrumental in challenging amnesty from a legal perspective.

Although as a human rights organization they did not have the power to directly impact

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<sup>298</sup> Engstrom and Pereira, "From Amnesty to Accountability," 99.

<sup>299</sup> Sikkink, *The Justice Cascade*, 77.

<sup>300</sup> Kathryn Sikkink, "From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights," *Latin American Politics and Society* 50 (2008), 12.

<sup>301</sup> *Ibid.*, 13.

<sup>302</sup> *Ibid.*

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.*, "Argentina: The Argentine Government's Failure to Back Trials of Human Rights Violators," Human Rights Watch 13 (2001): 31.

<sup>305</sup> *Ibid.*

the status of impunity, CELS swayed influential bodies which could disassemble impunity, notably the judiciary, and was able to ensure accountability in that way.

Madres de la Plaza de Mayo, HIJOS, and CELS, though not a complete picture of the diverse HROs operating in Argentina during the dictatorship and after, show the complex structure, goals, and strategies utilized to combat amnesty. These human rights organizations were able to impact decision-making groups like the executive branch, the judiciary, and the Congress, and were thereby critical to ensuring accountability and commencing domestic prosecutions as a transitional justice measure. These Argentine HROs dedicated their total time and energy to establishing accountability, contrasting with Brazilian human rights organizations that often tackle a wide range of issues.

### **Role of Public Attitudes**

Public attitudes were perhaps most influential in establishing accountability in the original 1983 democratic transition, but since then, they have had little impact in the status of amnesty, just as is the case in Brazil. During the dictatorship, human rights organizations battled state-imposed public suppression to highlight human rights violations taking place. Although their efforts met with some success, even human rights activists were hesitant to call for accountability due to the potentially disastrous consequences.<sup>306</sup> But due to the ruptured transition, the space to advocate for accountability came to exist. After the military established self-amnesty, 40,000 people marched in the streets of Buenos Aires demanding justice and shouting “Juicio y Castigo a Todos los Culpables” (Trials and Punishment for All the Guilty). Public mobilization and support of accountability undoubtedly influenced Alfonsín’s efforts to initiate

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<sup>306</sup> Sikkink, *The Justice Cascade*, 68.



prosecution. Despite a general public that preferred accountability, Alfonsín and his successor's subsequent actions to establish amnesty succeeded. Public opinion data from this period is illuminating: through the late 1980s, 70-80% supported military trials. In 1988, 73% believed that those who violated human rights were responsible regardless of rank. Still, the public was divided regarding Alfonsín's impunity laws; about 40% of Argentines both opposed and supported them.<sup>307</sup> When President Menem pardoned military officials, his approval rating declined significantly.<sup>308</sup>

Throughout the impunity from 1987-2005, however, human rights organizations strived to keep the past alive in society by holding public, visible events.<sup>309</sup> Kirchner's actions to purge the military and elevate human work upon taking office in 2003 were well received by the general public, although a majority felt that human rights trials should not occur through foreign courts,<sup>310</sup> perhaps as a result of the desire to try domestic criminals internally.

Although public attitudes played a role in the start of prosecutions, their importance was less salient than many factors. The public's role also became less significant as amnesty was reintroduced.

### **Role of External Actors**

External actors have been critical in explaining the introduction and persistence of amnesty and accountability. As detailed in the transition discussion, the IACHR visited

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<sup>307</sup> Alison Brysk *The Politics of Human Rights in Argentina: Protest, Change, and Democratization* (Stanford, CA: Stanford University Press, 1994), 140.

<sup>308</sup> Jelin, "The Politics of Memory".

<sup>309</sup> Elizabeth Jelin and Susana G. Kaufman, "Layers of Memories: Twenty Years After in Argentina," in *The Politics of War Memory and Commemoration*, ed. T.G. Ashplant et al, (New York: Routledge, 2000), 95.

<sup>310</sup> "Apoyo a la política hacia los militares," *La Clarín*, July 13, 2003, accessed March 31, 2013, <http://edant.clarin.com/diario/2003/07/13/p-01102.htm>.

Argentina during the dictatorship and called for human rights prosecutions, lending international pressure on the domestic judiciary to ensure accountability. This external influence was important in legitimizing domestic claims for prosecutions during the 1983 democratic transition.

During the amnesty period, domestic HROs' actions suggest a judicial boomerang effect, where groups like CELS sought international assistance to pressure the domestic Argentine government to restart trials.<sup>311</sup> This effect was evident when CELS challenged the amnesty law through the IACHR in 1992, and their conclusion that the amnesty laws and Menem's pardons were incompatible with the American Convention on Human Rights.<sup>312</sup> In response, Menem instituted reparations, but the IACHR continued advocating accountability.<sup>313</sup>

In 1994, Argentina's reformed constitution enshrined its international human rights treaties in domestic law, permitting international influences to hold more sway.<sup>314</sup> In 2001, when CELS argued through the *Símon* case that impunity violated Argentina's commitment to international, regional, and now domestic human rights standards, the influence of treaties like the American Convention on Human Rights ultimately eroded amnesty's legitimacy. They further leveraged external pressure through the use of amicus briefs written by foreign players. When the Supreme Court made their landmark decision in 2005 abrogating the *Ley de Punto Final* and *Ley de Obediencia Debida*, they cited the 1992 IACtHR decision that suggested Argentina's amnesty laws violated their

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<sup>311</sup> Sikkink, *The Justice Cascade*, 77.

<sup>312</sup> Ibid.

<sup>313</sup> Engstrom and Pereira, "From Amnesty to Accountability," 112.

<sup>314</sup> Sikkink, *The Justice Cascade*, 79., The 1994 reforms were pushed forward by Presidents Alfonsín and Menem and known as the "Pacto de Olivos", Manuel Eduardo Góngoro Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication*, (Inter-American Institute of Human Rights, 2011), 71.

international commitments.<sup>315</sup> In justifying their decision by appealing to the IACtHR ruling, external actors' ability to influence domestic decision-makers was evinced, although external power was largely leveraged by domestic HROs through the boomerang effect. Nevertheless, it was external acts that eventually justified internal decisions to curtail impunity.

Foreign court cases helped to pressure the domestic judiciary to hold their own trials, through the "Pinochet Effect." Beginning in the early 1990s and continuing throughout the period of impunity, European courts began investigating cases from the period of the dictatorship in which the victim was a dual or European citizen.<sup>316</sup> After it was possible for criminals to be tried through Argentina's domestic court system, these foreign trials ceased. In neighboring Brazil, foreign trials were not used to evade domestic impunity in the 1990s; they have only recently emerged, in 2007.<sup>317</sup> Nevertheless, while accountability was stymied in Argentina, European courts claimed jurisdiction frequently due to the country's large immigrant population and European policies that allowed immigrants' children to obtain dual citizenship.<sup>318</sup> Arrest warrants were issued for Argentines in France, Italy (where trials occurred in absentia), Germany, and Spain, but extradition requests were repeatedly denied by Menem, de la Rúa, and Duhalde.<sup>319</sup> In 1996, applying the concept of universal jurisdiction, Spanish judge Baltasar called for the trial of many military officials who had harmed people with Spanish nationality.<sup>320</sup> The Spanish court collected evidence from Argentine victims and

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<sup>315</sup> Ibid.

<sup>316</sup> Roht-Arriaza, *The Pinochet Effect*, 122.

<sup>317</sup> Sikkink, *The Justice Cascade*, 2007.

<sup>318</sup> Ibid.

<sup>319</sup> Roht-Arriaza *The Pinochet Effect*, 138.

<sup>320</sup> Richard J. Wilson, "Prosecuting Pinochet: International Crimes in Domestic Law," *Human Rights Quarterly* 21 (1999), 933.

human rights organizations.<sup>321</sup> An Argentine military worker, Adolfo Scilingo, admitted involvement in “death flights”, where victims’ bodies were disposed of in the Rio Plata from helicopters, due to feelings of guilt and denials of any wrongdoing by commanding military officers.<sup>322</sup> He traveled to Spain where Garzón interrogated him, ordered his international detention, and called for the arrest of other military officers.<sup>323</sup> In 2005, Scilingo was convicted through Spanish courts.<sup>324</sup> When another Argentine military officer, Ricardo Miguel Cavallo was passing through Mexico, Spain had him extradited for prosecution, but he was returned to Argentina in 2008 when domestic trials were possible.<sup>325</sup>

These cases, although most of them were thwarted by Argentine presidents, created a “Pinochet Effect” by making trials an issue of national pride and encouraging domestic, rather than foreign, prosecution, mobilizing civil society, and demonstrating the feasibility of accountability.<sup>326</sup> Undoubtedly, these cases pressured the domestic government to begin accountability measures by showing Argentine society that accountability was possible.

External influences were key in eroding Argentine amnesty. Intervention by the IACHR validated efforts by domestic HROs and condemned impunity. These measures pressured the domestic government to establish accountability and provided a justification for doing so. Universal and foreign trials, although typically not initiated by domestic actors, created linkages between HROs and judicial activists abroad who

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<sup>321</sup> Sikkink, “From Pariah State,” 20.

<sup>322</sup> Ibid., 22., Leigh Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence*, (Duke University Press, 2008): 44.

<sup>323</sup> Ibid., 24.

<sup>324</sup> Roehring, “Executive Leadership,” 737.

<sup>325</sup> Ibid.

<sup>326</sup> Naomi Roht-Arriaza, “The Pinochet Precedent,” 315.

attempted to circumvent Argentine amnesty laws. These linkages, and the trials themselves, highlighted Argentine impunity and pressured the domestic government to begin trials of their own. Brazil has recently begun to develop these external linkages due to increased opportunities, whereas in Argentina, they have existed since even before the transition.

### **Scale of Human Rights Violations**

Sikkink suggests that the level of Argentine repression helped make the case unique. She suggests that, “the repression was extreme, but not so extreme as to eliminate all possibilities for activism. The military regime in Argentina killed more people than did the regimes in Chile, Brazil, and Uruguay. Guatemala endured far greater repression than Argentina or any other country in the region, and the repression was so severe that it eliminated or silenced the human rights movement there.”<sup>327</sup> Although this argument is certainly plausible in helping to explain varying responses prior to transitions, it does not seem to bear much explanatory power for establishing amnesty or accountability after a country democratizes. At this point, the scope/scale of human rights violations during the dictatorship is less important; what is more important is the human rights situation after the transition. This helps explain why human rights organizations were more constricted in Brazil, where a more repressive political climate discouraged activism after democracy returned, whereas HROs in Argentina had more space to call for justice. The other nations Sikkink compares Argentina’s level of repression to almost all have initiated domestic prosecutions, with the exception of Brazil, suggesting that this factor is likely less important than many of the others discussed to this point.

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<sup>327</sup> Sikkink, *The Justice Cascade*, 81.

## Conclusion

Argentina's ruptured 1983 transition to democracy established a propitious environment to promote accountability in which amnesty was declared unconstitutional and trials began. However, the Ley de Punto Final and Ley de Obediencia Debida curtailed prosecutions, and President Carlos Menem's pardons ensured impunity for the former military regime. Nevertheless, human rights organizations and external actors continued advocating for an end to amnesty and establishment of justice. Although their demands were not realized for more than 20 years after democracy took root, in 2005, the Supreme Court's 7-1 ruling reopened trials for those who committed crimes during the 1976-1983 rule of the military junta.

Initially, trials were largely possible because of the way in which the ruptured transition undermined military control. However, amnesty was reintroduced due to a fear of military coup and the length of trials. Amnesty was reinforced by subsequent executives and court decisions.

Although many factors worked in tandem to re-establish accountability in Argentina, the work of HROs and external actors was instrumental. Finally, however, HROs and external actors were able to successfully pressure decision-making bodies, specifically the executive branch (Nestor Kirchner) and the Supreme Court. Nestor Kirchner became a powerful advocate of HROs and called for an end to amnesty. The Supreme Court cited external actors, notably the IACtHR, in their decision to abrogate amnesty, demonstrating international influence in domestic annulment. The judiciary and

executive play the most important role in overturning amnesty, but pressure from HROs and external actors can largely determine how those bodies act.

## CHAPTER 5: CONCLUSION

The cases of Brazil and Argentina illustrate how two countries facing similar histories and violent pasts (despite different scopes and scales) can utilize divergent mechanisms in their transitional justice processes. Following Brazil's transition, the pacted transfer of power to a civilian government helped ensure the military regime's impunity in the new society. Human rights activists received hostile receptions when advocating for justice and had difficulty swaying decision-making bodies and thereby having their voices heard in the quest for justice. The continued military influence, as well as support from the judiciary and executive branches of the government, helped preserve the 1979 Amnesty Law until today, although recent developments, such as the creation of a truth commission and visible human rights strategies, may indicate a changing environment.

In comparison, Argentina's 1983 democratic transition occurred after the military regime had been delegitimized. Their attempts at self-amnesty were quickly overturned and trials began with support from the executive branch and human rights organizations. When impunity was reintroduced through the Ley de Punto Final and Ley de Obediencia Debida and subsequent pardons for those convicted, it was hotly protested by both human rights organizations and external bodies like the IACHR and foreign courts. These innovative actions, visible to the general public and key decision-makers, permitted HROs and international attempts at justice to pressure and influence powerful bodies with the ability to abrogate the Amnesty Laws. This happened in 2003, when Congress, pressured by the executive, overturned the amnesty laws and in 2005, when the Supreme



Court ruled the laws unconstitutional, citing evidence from the IACHR. Their actions reopened trials and have resulted in numerous high profile convictions.

By comparing these two cases, it is evident that the unique contexts of a post-conflict society affect the introduction and persistence of amnesty. A pacted transition can help aid its introduction, although negotiated exits do not ensure the persistence of impunity. To determine what impacts amnesty's persistence, examination of decision-making bodies is necessary, such as the executive and judicial branches, which have the capability of overturning amnesty and establishing legal accountability. In that examination, it is clear that these bodies can be compelled to represent the preferences of human rights organizations and external bodies. When this influence is successful, decision-making groups will be pressured to overturn amnesty and establish accountability, as was the case in Argentina. In Brazil, however, until a recent IACtHR ruling, external influences have been inconspicuous, and human rights groups have faced high degrees of oppression. Additionally, the executive and judicial branches may be impermeable; they defend the Amnesty Law on the basis of its construction as a compromise necessary for re-establishing democracy, and still seem receptive to pressure from military groups to maintain the status quo.

Given the limited scope of two case studies, it is hard to draw evidence to enable generalizations and predictions regarding the introduction and persistence of amnesty in transitioning societies. Nonetheless, through the cases of Brazil and Argentina as well as others in the Southern Cone, it is evident that if the military retains enough influence to outweigh those calling for justice, amnesty will be introduced and upheld. In order for accountability to be introduced, some groups must pressure decision-making bodies to

overturn amnesty, and their pressure must be greater than that of perpetrators of human rights violations who are exiting power and obviously prefer amnesty to accountability in order to protect themselves. The groups that obtain this leverage can vary; in the case of Argentina, it was HROs and external bodies, but it may take the form of public opinion or could even be embodied by an activist executive, legislative, or judicial branch that strongly believes in the need for justice.

In Argentina, these groups took nearly 20 years to reach the critical mass needed to influence the behavior of the executive and judicial branches. However, in light of recent trends and the growing prevalence of the individual accountability model, it is likely that groups calling for justice will mobilize faster and with greater resources, legitimacy, and support in contemporary transitions. Domestic human rights organizations are likely to call for justice sooner, given the success of tribunals and domestic prosecutions, as well as the increase of international organizations and NGOs that can bolster their efforts and help pressure domestic governments externally. These external influences will bear more heavily on new democracies because of their expansion and increased experience in post-conflict scenarios. The public will mobilize more easily, seeing the success of human rights trials in other state's transitional justice processes and increased linkages with international activist groups.

The cases of Argentina and Brazil highlight the inherent interconnectedness of many factors in determining whether a transitional justice process will contain measures toward amnesty or justice. In Argentina, it was a combination of factors (ruptured transition, innovative human rights organizations, vocal external actors, and, eventually, a willing executive and judiciary) that led to accountability, whereas in Brazil, a variety of

forces safeguarded amnesty (pacted transition, continued repression, lack of external influences, and an executive and judiciary that favor the status quo). If Brazil had had a ruptured transition, would amnesty have been established persisted so long? It is hard to tell, given that one isolated force acting toward establishing accountability is unlikely to succeed on its own; it needs to be reinforced by other actors also calling for justice. This said, even societies that initially transitioned in a controlled way have established accountability, suggesting that other forces are preserving amnesty in Brazil, such as the lack of external influence, continued repression constraining the actions of human rights violations, and a preference for maintaining impunity by key decision-makers like the executive and judicial branches. All these factors likely have a larger influence than the method of transition. However, isolating their impact on amnesty poses a challenge, since they act in parallel.

In this same way, it is difficult to know what would have happened in Argentina had human rights organizations' calls for prosecution been received by a judiciary that had not been purged and an executive who was not trying to gain their support. We can imagine transitional justice processes as water filling up an enormous tub. Instead of one faucet dispersing water, this tub is filled by numerous faucets, all representing various actors that impact the status and pace of transitional justice processes. These actors can turn their respective faucets on and off until a successful combination of faucet flows overwhelms the rims of the tub. Although theoretically one faucet can fill the tub on its own, it takes an immense amount of time to do so; actors need the assistance and reinforcement of other, powerful actors to speed the process of overflowing the tub and achieve accountability. Similarly, different factors are at play in determining whether

amnesty will characterize a post-conflict society's response to those who committed human rights violations. Some are a force for accountability, such as human rights organizations and external actors, and in that way, they turn their faucets on. But other actors, like the powerful military and a conservative judiciary can reverse progress toward accountability. Such was the case of the reinstatement of amnesty in Argentina. We can understand actions that ensure amnesty as those that pull out the plug, allowing water to pour down the drain rather than overflow the tub. As long as impunity is ensured, it is a force against justice, countering efforts by the faucets trying to fill the tub. However, pro-impunity actions can be thwarted; when amnesty laws are circumvented, foreign trials take place, the judiciary is purged, civilian control of the judiciary is strengthened, truth commissions are established, or some development weakens the force of those acting to preserve accountability, the plug can be restored, and faucets can once again begin filling the tub, albeit at different magnitudes.

Once enough faucets are turned on by enough actors simultaneously, the tub can fill to capacity and domestic human rights trials begin. The necessity to consolidate democracy is also a practical concern when filling the tub and establishing accountability, and one that is mentioned often when a country transitions. Alfonsín was influenced by fears of another military coup, and therefore lobbied for an end to trials, effectively removing the plug from the tub. Brazil's 1979 Amnesty Law was established with the intention of facilitating the return to democracy, envisioning reciprocal amnesty as the best way to do so. Given the delicate nature of nascent democracies, a country's transitional justice process should take into account the domestic circumstances and the progression toward a consolidated democracy; in other words, the tub needs to be

plugged for the water to fill it and make progress toward accountability. Otherwise, filling the tub risks being counterproductive and simply wasting a lot of water. The exact time it takes to consolidate democracy varies on domestic conditions and thus, an exact timeline is not generalizable. Indicators such as civilian control of the military, an autonomous judiciary, and an end to repressive tactics may suggest an environment more amenable to accountability measures.

A combination of faucets will be necessary to reach the tub's overflow point, but the exact combination is unforeseeable. The tub can be filled faster if the society undergoes a ruptured transition, because the military typically cannot ensure their own impunity, and they therefore have less ability to remove the plug. Similarly, if the judiciary and other institutions are not reformed after the transition but maintain the policies of the dictatorship, the faucet controlled by the judiciary will likely remain off or only produce a slow trickle, and therefore, trials will be harder to establish. If reform takes place immediately or the society transitions through rupture, the faucet can fill the tub at a faster pace and more actors, such as human rights organizations who have greater space for protest, will be able to obtain easier access to forcefully turn on their own faucets. This said, however, even if the transition is pacted, it is possible for the tub to overflow, but the tub will likely take longer to fill and the plug must be in place for accountability forces to have noteworthy impact. A pacted transition can be associated with a powerful military, lack of institutional reform, and an oppressive human rights environment, all circumstances that slow the pace with which faucets can fill the tub.

The judiciary and executive branches control the most powerful faucets with greater strength that can most easily contribute to a water level that overwhelms the tub,

and they are therefore crucial to establishing individual accountability measures. The president will likely have more sway if he is an accountability advocate; in this scenario, he can lobby the legislature and judiciary to overturn amnesty, and can carry out measures to make that outcome more likely, such as judicial reform or appointing justices whose preferences align with his. If, however, a president opposes accountability, the judicial and legislative branches can easily bypass the executive's preferences and annul amnesty on their own accord. As such, the president is able to forcefully increase his faucet's flow, but he may have more trouble ensuring that the tub remains unplugged or unplugging it himself, especially if doing so opposes the preferences of the legislature or judiciary who have explicit power to determine amnesty's status.

In Argentina, a combination of actors worked together to turn on their faucets with enough strength to overwhelm the tubs limit. Creative strategies by HROs such as HIJOS and Madres, in tandem with external action like statements and decisions by the IACHR and IACtHR, and ultimately, the desire, or at least willingness, of those with the power to annul amnesty to do so worked together to overflow the tub. In Brazil, too many factors are preventing the tub from filling. The initial pacted transition meant that filling the tub was not initially possible. Essentially, the amnesty law ensured that any water added would immediately drain. Now, circumstances like the IACtHR's decision, the truth commission, and attempts to circumvent amnesty have plugged the tub, but powerful military influences, Supreme Court decisions, and an executive who approves of the status quo are thwarting their progress, leaving their faucets in an emphatically off position, and ensuring that the tub does not overflow. If the Supreme Court or the executive suddenly reversed its position, they would join forces already working to fill

the tub, and it is possible that the myriad actors whose interests and preferences converge around establishing accountability could do so.

But should it be a society's goal to completely fill the tub? Despite trends toward individual accountability, it is likely that amnesty will tend to persist in some locations worldwide, and that its persistence is not necessarily counterproductive in achieving greater respect for human rights and the return of rule of law. If a society is able to return to normalcy without trials, and victims have come to terms with their society's troubled past, then it is not necessary for the individual accountability model to be imposed on their transitional justice process. Only when it is helpful and necessary should it be utilized. South Africa serves as the paragon of a society which has managed a transitional justice process, re-establishing the rule of law and respect of citizens' rights without formal prosecutions.<sup>328</sup>

The Arab Spring transitions will provide an interesting lens through which to examine these trends. The experiences of Argentina and Brazil could provide insight into countries like Egypt, Tunisia, and Libya. Argentina and Brazil highlight the uniqueness of each country's transitional justice processes and mechanisms. They also emphasize the length and evolution that transitional justice processes may undergo. Argentina has gone from amnesty to accountability, back to amnesty, and back to accountability in the 30 years since the dictatorship dissolved. Brazil has maintained amnesty for nearly 30 years since Tancredo Neves became the first civilian president in 1985, and calls for accountability have only recently strengthened. For trial advocates, their experiences portend a long and difficult battle to establishing individual accountability measures. But, unlike when Brazil and Argentina initially transitioned, the Arab Spring countries are

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<sup>328</sup> Du Bois-Pedain, "Accountability through Conditional Amnesty," 258.

transitioning in the aftermath of global structural changes (the end of the Cold War and the third wave of democracy) that have made the individual accountability model more prevalent.<sup>329</sup> Individual accountability has been enshrined in international agreements, advocated by international human rights organizations, and championed by individual jurists, lawyers, and activists<sup>330</sup>. The resulting justice norm has diffused globally, indicating that amnesty will be less accepted, on both a national and international level, than ever before, with many actors pressuring new democracies to bring their former oppressors to justice.<sup>331</sup> The environment in which Arab Spring countries are currently transitioning is decidedly different from that in which Argentina and Brazil democratized, in part due to the efforts sustained by justice advocates in Argentina, Brazil, and the rest of the Southern Cone.

In Brazil and Argentina, different circumstances have permitted different actors to yield influence over the transitional justice process. This evolution suggests that even if contemporary calls for justice fail, they may be successful in later years. Continued calls for Brazilian accountability suggest that not all victims feel the transition from an authoritarian to a peaceful society has been effective. This might suggest that tactics utilized in Argentina, and some of those in Brazil, could be implemented by other countries to help their transition. These measures might include immediate institutional reform, truth commissions, and domestic prosecutions. This said, even if some Argentines feel satisfied with their transitional justice process, many note its flaws, such as its extremely lengthy duration. Argentina is globally unique in its dedication to holding military officials accountable through their domestic judicial system, a fact that they are

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<sup>329</sup> Sikkink, *The Justice Cascade*, 23-24.

<sup>330</sup> Ibid.

<sup>331</sup> Ibid.



proud of, but that requires an immense amount of resources and time, which might lead other states to pursue accountability through international courts. Further, it would be superficial to assume that one country's transitional justice process could be implemented successfully in another country. Transitional justice processes ultimately need to address victims' needs and desires, the unique history and culture of that society, and their idea of what their post-conflict society will look like.

Brazil's 7-member truth commission, set to deliver a final, detailed report on May 16, 2014, represents a significant step in the nation's transitional justice. Although it lacks the ability to hold perpetrators or human rights violations accountable, it is making considerable efforts to obtain accurate information about the military dictatorship and recover the facts and acknowledge the crimes committed. On Saturday, March 23, the National Truth Commission held a public hearing regarding Panair, a Brazilian airline that was shut down by the military government in 1965.<sup>332</sup> The military's decision to suspend Panair's operation was motivated by political factors, and all employees were dismissed.<sup>333</sup> According to Rosa Cardoso, a member of the Truth Commission, "Panair's extinction, dismissal of employees, and the persecution suffered by the company after they were prevented from flying not only constitute a serious violation of the business owners' rights, but of all the employees and society itself, who lost the services of an exemplary company."<sup>334</sup> Terminated employees, their families, and the former president of Panair testified before the Commission and commemorated 18 Panair employees who

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<sup>332</sup> "CNV open line of research on companies affected by the dictatorship," *National Truth Commission*, March 20, 2013, accessed April 2, 2013, <http://www.cnv.gov.br/index.php/outros-destaques/227-cnv-abre-linha-de-investigacao-sobre-empresas-prejudicadas-pela-ditadura>.

<sup>333</sup> *Ibid.*

<sup>334</sup> "Emotion dominates public hearing on the case of Panair," *National Truth Commission*, March 27, 2013, accessed April 2, 2013, <http://www.cnv.gov.br/index.php/outros-destaques/233-emocao-domina-audiencia-publica-sobre-o-caso-panair>.

were killed by the military regime.<sup>335</sup> The public hearing was described as “emotional” and those who testified were “anxious.”<sup>336</sup> Paulo Sérgio Pinheiro, the coordinator of the Truth Commission, addressed those present, stating that, “Understanding the relationship between business and the military coup is a crucial state of the search for truth.”<sup>337</sup> Rosa Cardoso stated that the victims of the Panair case already know the truth and have suffered from its implications, but the purpose of the Truth Commission is “sharing it with Brazilian society.”<sup>338</sup> Although the information uncovered by the Truth Commission cannot result in punitive measures and will not legally hold anyone accountable for their actions, various international human rights organizations have praised the Truth Commission’s creation as a step forward. An Inter-American Commission on Human Rights Press Release stated:

International human rights law has recognized that everyone has a right to know the truth. In the case of victims of human rights violations and their families, access to the truth about what occurred is a form of reparation. In this regard, the establishment of a Truth Commission in Brazil will play an essential role in ensuring respect for the right to the truth for victims of past human rights violations, as well as for all people and society as a whole.<sup>339</sup>

Human Rights Watch also wrote President Rousseff a letter supporting her efforts to create a truth commission, but stated that:

“While truth commissions and other extrajudicial mechanisms can never substitute criminal investigations and prosecutions of atrocities, they have the potential to be valuable complementary tools for preserving historical memory, clarifying events, and attributing political and institutional

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<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Paulo Sérgio Pinheiro, “Opening Address to the Public Regarding Panair,” (speech presented at the National Truth Commission Hearing, Rio de Janeiro, Brazil, March 25, 2013), [http://www.cnv.gov.br/images/pdf/publicacoes/paulo\\_sergio/23\\_03\\_13\\_discurso\\_PSP\\_MRL\\_Panair.pdf](http://www.cnv.gov.br/images/pdf/publicacoes/paulo_sergio/23_03_13_discurso_PSP_MRL_Panair.pdf).

<sup>338</sup> “Emotion dominates public hearing on the case of Panair,” *National Truth Commission*, March 27, 2013

<sup>339</sup> “IACHR Welcomes Establishment of the Truth Commission in Brazil,” *Organization of American States*, May 15, 2012, accessed December 5, 2012, [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/048.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/048.asp).

responsibilities. We hope that Brazil's truth commission will be followed by serious efforts towards full accountability for past atrocities."

Whether the commission's efforts are followed by judicial action remains to be seen.

Although the hose has been turned on by external influences and human rights organizations, the executive and judiciary branches are still acting to prevent the pool's overflow, in striking contrast to neighboring Argentina.

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